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No._____

In the
Supreme Court Of The United States
October Term 1993

DARYL J. BERGMANN,

Petitioner,

v.

LEE DATA CORPORATION, a Minnesota corp., now known as Apertus Technologies, Inc., ROBERT GORDON, SARAH MacRAE, GARY WHITE, ROBERT BESINGER and BRIAN KOVALCHUK;

Respondents.

Petition For Review Of Decision Of Court Of Appeals To The Supreme Court For The State Of Minnesota

PETITION FOR WRIT OF CERTIORARI

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PUBLISHER'S NOTE:

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Pg. i

QUESTIONS PRESENTED FOR REVIEW

I. RIGHT TO JUSTICE AND FOURTEENTH AMENDMENT ISSUES

Whether the lower courts denied Petitioner his right to a jury trial and his right to redress his grievances as guaranteed to him pursuant to the Restructured Constitution of the State of Minnesota, Article I, Sections 2, 4, and 8, and the Fourteenth Amendment of the United States Constitution?

II. FREEDOM OF SPEECH AND FOURTEENTH AMENDMENT ISSUES

Whether the lower courts acted so as to abridge Petitioner's right to the freedom of speech guaranteed to him under the First Amendment to the United States Constitution as incorporated by the Fourteenth Amendment?

III. FOURTEENTH AMENDMENT ISSUES PER SE

Whether the lower courts abridged Petitioner's privileges, deprived him of liberty or property without due process of law, or denied him equal protection of the laws as required by the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS TO PETITION

	Page
CAPTION	i
QUESTIONS FOR REVIEW	ii
TABLE OF CONTENTS TO PETITION	iii
TABLE OF AUTHORITIES	iv
REPORTS OF OPINIONS IN THE CASE	x
JURISDICTION	x
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED	xi
STATEMENT OF THE CASE	1
A. Facts Material To Questions Presented For Review	1
B. Manner Of Raising Federal Question In The State Court	11
ARGUMENT	19
A. Right to Justice And Fourteenth Amendment Issues	19
B. Freedom Of Speech And Fourteenth Amendment Issues	22
C. Fourteenth Amendment Issues Per Se	23
APPENDIX	Separate Volume

TABLE OF AUTHORITIES

Case	Page
Armstrong v. Duffy 90 Ohio App. 233 103 N.E.2d 760	21
Borchardt v. Kulich 48 N.W.2d 318	25
Breen v. Kahl 296 F.Supp. 702 Affd. 419 F.2d 1034 Cert. denied, 90 S.Ct. 1836	23
Brown v. Western Ry. of Ala. 70 S.Ct. 105 388 U.S. 294	14
Bruder v. Wolpert 178 Minn. 330 227 N.W. 46	25
Byars v. U.S. 47 S.Ct. 248 273 U.S. 28	23
Chrysler Corp. v. New Motor Vehicle Brd. 153 Cal.Rptr. 135	23
Cleveland Brd. of Ed. v. La Fleur 94 S.Ct. 791 414 U.S. 632	21

TABLE OF AUTHORITIES

Case	Page
Copperweld Steel Co. v. Industrial Comm. of Ohio 65 S.Ct. 1006 324 U.S. 780	19
Dukich v. Blair 3 F.2d 302 46 S.Ct. 469	26
Durley v. Mayo 76 S.Ct. 806 351 U.S. 277 Rehearing denied, 77 S.Ct. 22	14
Edwards v. So. Carolina 83 S.Ct. 680 372 U.S. 229	23
Gewertz v. Jackman 467 F.Supp. 1047	23
Grove Press Inc. v. City of Phil. 418 F.2d 82	23
Hagar v. Reclamation Dist. 4 S.Ct. 663	28
Harlow v. Ryland 78 F.Supp. 488 Affd. C.A. 172 F.2d 784	19
Hilliard v. Scully 537 F.Supp. 1084	22

TABLE OF AUTHORITIES

Case	Page
Howard v. De Cordova 20 S.Ct. 817 177 U.S. 609	11
Ingram v. Richardson 471 F.2d 1268	20
Jurek v. Estelle 593 F.2d 672 Rehearing, 623 F.2d 929 Cert. denied, 101 S.Ct. 1709	14
Massa v. Nastri 3 A.2d 839 125 Conn. 144	19
Miller v. R.K.A. Mgmt. Corp. 160 Cal.Rptr. 164	22
Morgan v. State of Florida 337 So.2d 951	23
Olson v. Aretz 346 N.W.2d 178	19, 22
Reitman v. Mulkey 87 S.Ct. 1627	27
Republic Pictures Corp. v. Kapppler 66 S.Ct. 523 151 F.2d 543	20

TABLE OF AUTHORITIES

Case	Page
Skelly Oil Co. v. Univ. Oil Prods. Co. 338 Ill. 79 86 N.E.2d 875	21
Southwestern Bell Tel. v. State of Oklahoma 58 S.Ct. 528 303 U.S. 206	14
State v. Nortwstrn. Prep. Sch. 37 N.W.2d 370	27
State v. Pehrson 287 N.W. 313	27
Stockler v. Mich. 98 S.Ct. 1598	27
Toledo, St. L.&W. R. Co. v. Slovin 35 S.Ct. 306 236 U.S. 454	11, 14
Thomas Oil, Inc. v. Onsgaard 215 N.W.2d 793	28
U.S. v. Goodwin 102 S.Ct. 2485 457 U.S. 368 Rehearing, 687 F2d 44	22
Valley Natl. Bk. v. Glover 62 Ariz 538 159 P.2d 292	24, 28

TABLE OF AUTHORITIES

Case	Page
Van Zandt v. McGee 202 F.2d 490	27
Weinberger v. Salfi 95 S.Ct. 2457	14
Whitney v. Madden 400 Ill. 185 79 N.E.2d 593 Cert. denied, 69 S.Ct. 55	24

TABLE OF AUTHORITIES

Consititutional Provisions **Page**

United States Constitution

Article IV, Section 2 ..... xi, 24
First Amendment ..... xi, 6, 22
Fourteenth Amendment ..... xi,, 18, 19-28

Minnesota Restructured Constitution

Article I, Section 2 ..... xii, 19
Article I, Section 4 ..... xii, 19, 28
Article I, Section 8 ..... xii, 19, 28

Statute or Rule

28 U.S.C. Sec. 1257(3) x
28 U.S.C. Sec. 2101(c) x
U.S.S.C. Rules, Rule 13.1 x

Minn Stat., Sec. 336.8-319 ..... 3, 4, 5
Minn.Stat., Sec. 481.08 ..... 3, 5, 18
Minn.Stat., Sec. 513.01 ..... 3, 4, 5
Minn.Stat., Sec. 588.04 7

REPORTS OF OPINIONS IN THE CASE

1. Order and Memorandum, Minnesota District Court, Fourth Judicial District, by Judge Kevin S. Burke, dated March 27, 1992.....Appendix, App. . 29

.

2. Order, Minnesota Court Of Appeals, by Chief Judge Wozniak, filed September 1, 1992 ..... Appendix, App. 5.

3. Order and Memorandum, Minnesota District Court, Fourth Judicial District, by Judge Kevin S. Burke, dated April 1, 1993..... Appendix, App. 6.

4. Unpublished Opinion, Minnesota Court Of Appeals, by Judge Thomas Kalitowski, dated December 13 and filed December 21, 1993 ..... Appendix, App. 2.

JURISDICTION

The judgment of the Court Of Appeals for the State of Minnesota was entered on December 21, 1993, affirming the Trial Courts Orders Dated March 27, 1992 and April 1, 1993 denying Petitioner's Motion To Vacate The Dismissal and granting specific enforcement against Petitioner of an unexecuted settlement agreement. On February 24, 1994, the Supreme Court of the State of Minnesota entered its Order denying review. This Petition For Writ Of Certiorari was filed within 90 days of that date pursuant to 28 U.S.C. Sec. 2101(c), USSC Rule, Rule 13.1. The jurisdiction of this Court is founded upon 28 U.S.C. Sec. 1257(3), prg. 3, and interpretative case law.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

PROVISIONS OF THE UNITED STATES CONSTITUTION

Article IV, Section 2, First Paragraph, United States Constitution:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

First Amendment, United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment, First Paragraph, United States Constitution:

"1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

PROVISIONS OF THE RESTRUCTURED CONSTITUTION OF THE STATE OF MINNESOTA

Article I, Section 2,
Rights and privileges

"No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. There shall be neither slavery nor involuntary servitude in the state otherwise than as punishment for a crime of which the party has been convicted."

Article I, Section 4,
Trial by jury

"The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy. A jury trial may be waived by the parties in all cases in the manner prescribed by law. The legislature may provide that the agreement of five-sixths of a jury in a civil action or proceeding, after not less than six hours' deliberation, is a sufficient verdict."

Article I, Section 8,
Redress of injuries or wrongs

"Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws."

MINNESOTA STATUTES AND RULES OF CIVIL PROCEDURE

Minnesota Statutes Sections:
(Fully set forth at Appendix, App. 49)

Stat. of Frauds [Stocks].....336.8-319
Stat. of Frauds [General]. 513.01
Authoity.....481.08
Order to Show Cause 588.04

Minnesota Rules Of Civil Procedure:
(Fully set forth at Appendix, App. 42

Rule 6.04 For Motions and Affidavits
Rule 7.02 Motions and Other Papers
Rule 11.00 Signing of Pleadings
Rule 12.06 Motion to Strike
Rule 52.01 Findings by Court
Rule 63.02 Interest of Bias

Minnesota General Rules Of Practice:
(Fully set forth at Appendix, App. 46)

Rule 115.02 Obtaining Hearing Date
Rule 116.00 Orders to Show Cause

Minnesota Rules Of Civ. Appellate Proc.:
(Fully set forth at Appendix, App. 46)

Rule 103.03 Appealable Judgments
Rule 104.01 Time for Filing
Rule 108.03 Extent of Stay
Rule 110.05 Correction of Record
Rule 128.02 Formal Brief
Rule 128.03 Refs. in Brief
Rule 140.01 Petition for Rehearing

STATEMENT OF THE CASE

A. Facts Material To Questions Raised For Review.

This case has not been tried

Petitioner was employed by Lee Data Corporation as its Director Of Legal Services under a contract of employment. Petitioner was responsible in his position to handle legal matters, and control outside legal services and costs, which were performed by the law firm of Dorsey & Whitney, ("Dorsey"). Shortly after Dorsey publicly announced their hiring of former Vice President Walter Mondale to head its international law section, Lee Data's management announced its proposal for a major joint venture with its overseas customer, Olivetti International. Thereafter management told Petitioner not to be concerned about Dorsey's fees in connection with cost control. Substantial legal fees were paid to Dorsey for redundant and unproductive efforts in connection with the proposed venture. Petitioner questioned management for paying unnecessary legal fees in excess of $100,000. Petitioner also questioned Dorsey for promoting the joint venture proposal without any real purpose other than to artificially inflate the price of Lee Data stock in order to allow management to unfairly profit from their stock options.

Shortly after these issues arose, Petitioner was falsely accused of sexual harassment on allegations put to him by management. Petitioner was offered $10,000 in exchange for a resignation and release. When he declined, Petitioner was threatened that he would be fired and falsely and publicly labeled a sexual harasser. Petitioner still refused to accept the payment or sign a release of employment and management followed through on those threats.

Petitioner was wrongfully terminated from his employment on false allegations. This litigation was initiated to force

Respondents to produce first hand testimony and evidence of the sexual harassment charge. During the past five years of litigation Petitioner has not been allowed by the court to obtain a full deposition, charge or sworn statement by a victim, or obtain discovery of notes identified as part of a charge. Further, the court has refused to hear Petitioner's motions for sanctions against Respondents or Dorsey for their willful concealment of certain summary notes, (the "White Notes"), or to compel production of those documents. [Respondents produced some hearsay testimony by management officials and other employees under their control, but not even those allegations put forth a prima facie allegation of sexual harassment.]

Throughout the ensuing litigation Dorsey's counsel and the courts acted in an oppressive manner with an intentional disregard for Petitioner's constitutional rights.

The record shows that the lower courts knowingly allowed Respondents' to violate Protective Orders, court rules, and to put forth misrepresentations on the record with impunity at every stage of the litigation and appeal of this case.

In the fall of 1991, Respondents' put forth a dismissal of the case to the court based on a purported settlement agreement that had been procured by fraudulent means. All the signature and intended notary acknowledgment lines of the settlement agreement form are blank and there is no signature of acceptance on the document. There is a scribbled notation by Petitioner's attorney, in the margin of the last page of the form, stating: "Reviewed by Alan G. Greenberg 9/27/91 meets our discussion of agreement". The document includes a clause specifying a requirement for Petitioner's personal signatory acknowledgment. (Refs: Rsps.Am.Ord., Aug.4, 1992; Apl.Brf.)

Promptly after discovering that the case had been dismissed, Petitioner notified the court of the fraud, and moved to set the

dismissal aside. At the same time Petitioner sought discovery on grounds of misconduct and misrepresentation by Dorsey's attorneys, (ref: Ptrs.Mot., Nov. 27, 1991). By that motion Petitioner asked the court for a brief in-camera review of documents to show Dorsey's misconduct. The court refused to hear or consider Petitioner's in-camera hearing and discovery requests, and prohibited Petitioner from entering a tape recorded statement by his former attorney into evidence. The court affirmed its dismissal, (Order, App. 29).

Petitioner then appealed to the Minnesota Court of Appeals. On the same day, the trial court amended its prior order and decided to rehear the matter on Respondent's motion to specifically enforce the unsigned settlement agreement against Petitioner. Contravening its jurisdiction and obligation pursuant to its own rules, (MRCAP, Rules 103.03, 108.03), for the purpose of "judicial economy", (ref: Order, App. 5), the Court of Appeals dismissed Petitioner's appeal to allow the trial court to act on Respondents' motion. .

On memorandum submission to the trial court Petitioner argued that the disputed settlement agreement was not signed as required by its express terms, or as required by Minn.Stats. Secs. 481.08, or other statutory requirements, (refs: Rsps.Am.Ord., App.Brf. A-45, ls. 11-23; A-47, l. 12 to A-49, l. 16; and A-49, l. 17 to A-51). Petitioner's papers showed that the court had made clearly erroneous assumptions in connection with its prior order and memorandum dated March 27, 1992, (ie: the court had erroneously assumed that certain costs and sanctions had not been paid); and, that the dismissal was a result of attorney misconduct. The court found that Petitioner's attorney had authority to settle, that he made an oral settlement agreement, and then ordered specific enforcement of the written document. The trial court did not find that the settlement agreement had been signed for the purpose of accepting the written document. (Ref: Order, Apr. 1, 1993, App. 7) The court also decided that the case would have been

alternatively dismissed for late payment of sanctions. Petitioner thereupon reasserted his appeal in the case. On appeal the court denied Petitioner's right to claim the defense of the Minnesota Statute of Frauds, Minn.Stats., Secs. 513.01 and 336.8-319. The Court of Appeals affirmed the trial court's dismissal and specific enforcement of the written document, and alternatively decided that the attorney's notation would satisfy the statute of frauds. Petitioner then filed for writ of certiorari for review by the Minnesota Supreme Court. The Supreme Court denied certiorari, and this Petition is taken from that order dated and filed February 24, 1994.

Certain instances of court action denying Petitioner's privileges, equal protection, and due process in this case are described below:

(1) In their response to the Petition For Writ Of Certiorari to the Minnesota Supreme Court, Respondents submitted a lengthy reply brief that contained numerous pages of inflammatory falsified comment that did not appear on the record in the case and which the Court of Appeals had ordered striken from the record. (Ref:. Minn. Ct. Appls. Decs. App. 4 and Ptrs. motion papers filed with Ct. Appls. Oct. 25, 1993 and Nov. 4, 1993) Every page of the "Argument" section of Respondents' Brief includes false allegation and innuendo. Petitioner was irreparably harmed by Respondents' willful order violation because there is no procedure in Minnesota allowing a rehearing of the Supreme Court's denial of Certiorari, and the first and only opportunity for review is by this Petition For Certiorari.

(2) In the Court of Appeals, the court refused to rule on Petitioner's Motion To Supplement The Record. Petitioner filed his duly served motion on November 10, 1993. The motion was necessary because many of Petitioner's papers and critical supporting affidavits that proved Respondents misrepresentations and other willful misconduct were missing

from the court file. The documents were listed on the court record index, and had been properly served and filed. Respondents did not serve any paper to contest or object to Petitioner's Motion. The Court of Appeals ignored Petitioner's Motion, which was properly before it pursuant to MRCAP, Rule 110.05. By not ruling on that Motion the Court of Appeals shielded a large portion of the record from the view of the Supreme Court, and from public exposure of many improprieties in the case by the Respondents, and the lower court.

(3) The Court of Appeals denied Petitioner's initial appeal for purposes of judicial expediency by allowing the trial court to continue to review the case. That order was made without precedent and in disregard for Petitioner's due process rights. Minnesota law stays the action of a trial court pending appeal when a party files a bond pursuant to MRCP, Rule 108.03. Petitioner properly filed his bond and perfected his appeal on July 15, 1992. Petitioner was entitled to a stay of the trial courts further actions in connection with the issues appealed. Therefore, the trial court did not have jurisdiction in the case to "close" the record, specifically enforce the alleged settlement agreement, proclaim an oral contract, or take any other action after July 15, 1992 on the issues appealed. The appeals court was obligated to hear the case when the initial appeal was perfected. The appeal court's improper dismissal delayed the case for a full year and afforded the opportunity for the trial court's continued abuse of discretion.

(4) While dismissing Petitioner's initial appeal to permit further trial court action, the Court of Appeals dismissed on the merits a portion of the appeal that related to discovery and sanction orders issued prior to October 1991. In dismissing the appeal as to those orders the Court Of Appeals reasoned that they did not have jurisdiction over the judgment and orders entered on or before October 1991. The Court Of Appeals allowed the appeal as to the final entry of judgment filed

March 27, 1992 and as to all issues raised by Petitioner's Motion To Vacate The Dismissal dated November 27, 1991. [The court then dismissed the otherwise valid appeal pending further trial court involvement, as described by point 4 above.] Petitioner's Motion To Vacate The Dismissal included new descovery request. based on the new grounds and facts raised as to Respondents' misrepresentations and misconduct. The Court Of Appeals was obligated to review Petitioner's grounds and motion for completing his discovery, and for setting aside the sanction orders based on misrepresentation and misconduct.

(5) The trial court denied Petitioner's discovery in the case on grounds that: (i) the accusation of misconduct was "preposterous", (A-417, l. 5); and, (ii) Petitioner's showing that Respondents knowingly manufactured false testimony by illegal means to defame Petitioner is simply "part of the American system of justice". (See refs., Id.; Crt.Rptrs.Aff., A-461-463; Order, A-400, prg. 2). These are not legitimate reasons to block discovery, but served the purpose of intimidating the Petitioner and suppressing his First Amendment right to free speech. Based on the sworn testimony of the Defendant Gary White, Respondents knowingly concealed important discoverable documents. Petitioner's allegations of other forms of misrepresentation and misconduct were also well documented and supported by several disinterested affiants.

(6) The trial court denied Petitioner's right to a hearing and to compel Respondents' to appear and answer Petitioners' motion and evidence showing their misrepresentations to the court and other misconduct in the case. Procedurally these circumstances arose as follows: Respondents filed a motion to strike Petitioner's response to the trial court's amended order filed July 14, 1992; Respondents' motion contained incomplete and false information and was a sham motion by definition of MRCP, Rules 7.02, 11 and 12.06 because it was based on

unsigned documents, did not notice a hearing date and Petitioner had not been given an opportunity to be heard on his adverse fact allegations opposing Respondents' papers as false and contradictory. Further, the trial court was stayed from hearing the sham motion under MRCAP, Rule 108.03, Respondents' sham motion was made solely for the purpose of getting certain affidavits before the Court of Appeals; Petitioner replied to Respondents' sham motion by documenting the misrepresentations and misconduct in making the motion and in other matters throughout the case up to that point. Following Petitioner's reply submission the Respondents' attorneys would not set a hearing on their own motion so Petitioner noticed Respondents' motion and his cross-motion for hearing; when Respondents refused to appear at the hearing Petitioner submitted his duly noticed Application For Order To Show Cause as to why Respondents should not be held in contempt for their misrepresentations, misconduct, and failure to appear at the hearing. [By reference, Petitioner's Application fully incorporated his reply to Respondents motion to strike.] The trial court judge completely ignored Petitioner's Application, cross-motion and reply to Respondent's motion to strike. Petitioner's Application was duly made pursuant to Minn.Stat. Sec. 588.04, and MRCP, Rule 6.02. Petitioner was entitled, under Minnesota law, to make his Application For Order To Show Cause. Petitioner's Application included documentary evidence proving Respondents concealed the identity of material discoverable information in the case, (Apl Brf., A187); that Respondents twice violated the Protective Order in the case for the purpose of maliciously damaging Petitioner's reputation, (Apl. Brf., A190); that Respondents' lied and committed perjury in connection with their motion papers served August 19, 1992; that Respondents' incited threats of physical harm to Petitioner and his family; and, that they bribed a witness and helped her manufacture false testimony to defame Petitioner, (Apl. Brf. A149, 197). Petitioner is entitled to confront Respondents for these actions and to a hearing on the evidence.

(7) The trial court used sanctions against Petitioner in an oppressive manner for the purpose of suppressing his claims, opinions and lawful discovery.

The court ordered sanctions were based on Petitioner's alleged failure to make discovery of certain notes he claimed to be protected as attorney work product. Petitioner supported that claim with affidavits of three attorneys and his own affidavit. At the same time Petitioner sought discovery of certain notes which allegedly supported a charge of sexual harassment against Petitioner.Respondents claimed that their documents were subject to protection as attorney work product based on a statement by Lee Data's personnel representative, the Respondent Mr. White, (who was only responsible for taking some of the notes himself), that he believed the charge could lead to litigation because Petitioner is a lawyer. Cross-motions to compel discovery were then filed. Shortly before the hearing scheduled for the cross-motions, Petitioner's attorney promised and delivered Petitioner's notes to Respondents' attorneys based upon a mutual promise by respondents to release their documents. Instead of releasing their notes, Respondents' attorneys reneged on there verbal commitment, went ahead with the hearing and demanded attorney fees against Petitioner. The court then issued an order imposing sanctions of against Petitioner and denying Petitioner's discovery of Respondents' notes. Before issuing its final ruling on this matter the trial court ordered a pretrial conference. At the conference, Respondents made a settlement offer of $10,000 to Petitioner. The trial judge told Petitioner to either accept the settlement offer or he would impose sanctions of $2,000. Petitioner declined the offer of settlement and the trial judge sanctioned Petitioner $2,000under the guise of a failure to produce the documents that Petitioner's counsel had already delivered to Respondents' attorneys.

Petitioner then asked that the case be transferred to a different judge. The trial judge (Judge Sommerville) arranged to transfer the case to Judge Burke, who has admitted on the record that he is a close personal friend of Judge Sommerville. The Assignment Office for civil cases in the Fourth Judicial District makes judge assignments by a computer generated random selection. When a judge removes himself as Judge Sommerville did in this case, judges are reassigned by the Assignment Office again pursuant to a computer generated random selection. Judge Sommerville and Judge Burke went outside of court procedures to arrange the transfer of the case because Judge Burke is a personal friend of Judge Sommerville's. MRCP, Rule 63.02 requires that, "No judge shall sit in any case if that judge might be excluded for bias from acting therein as a juror." That rule is mandatory, not discretionary. In this case Judge Sommerville's conduct was called into question in the trial court. Judge Sommerville's onduct and Petitioner's requests for discovery were therefore reviewed by his personal friend, Judge Burke, by special arrangement made outside of the normal procedure for assignment in the court.

When taking the case Judge Burke agreed to reconsider Judge Sommerville's sanction order. When making his decision Judge Burke sanctioned Petitioner an additional $7,247.50 plus a $1,000 charge for "court costs", on the assumption that Petitioner willfully violated the first court order to pay $2,000 in sanctions. Petitioner's attorney excluded Petitioner from the hearing on these issues.

The Court Of Appeals did not review or rule on any of these matters, presumably on the basis that the trial court rulings were issued before October 1991 pursuant to the explanation given at paragraph 4 above. However, all of these issues in connection with sanctions and the underlying discovery were raised after October 1991 by the trial court in its orders of March 27, 1992 and May 3, 1993; and by

Petitioner's Motion To Vacate The Dismissal and timely appeal of the orders resulting from that motion.

Before this lawsuit was served, Petitioner filed professional misconduct charges against certain Dorsey attorneys, and sought to inform the Lee Data board of directors as to conduct by management and Dorsey indicating an embezzlement of shareholder funds and a kickback scheme. The misconduct charges were reviewed by Vance Opperman, who has publicly been referred to as the "God Father" of the Democratic Party in Minnesota, and by William Wernz, who was later hired by Dorsey at a substantial salary increase. The misconduct charges were deferred to the court because Mr. Opperman stated he "anticipated litigation". The courts refused to act on motions, show cause order applications and other proper means by Petitioner to obtain a remedy for Dorsey's misconduct in the case. Following the improper dismissal of the case, Petitioner again sought review of attorney misconduct. Upon that filing the Lawyers' Review Board suppressed the investigation and threatened misconduct charges against Petitioner because of his allegations against Dorsey and Respondents. The Board investigator who was assigned, works for the state's attorney general, H.H. Humphrey III, an influential leader of the Democratic party in Minnesota. The investigator refused to review the information documenting the misconduct, including statements by two attorneys indicating that Petitioner's former attorney, Mr. Greenberg, had sold-out other client cases.

This Petition is founded on the lower courts' willful disregard of Petitioner's fundamental constitutional guarantees. Petitioner claims that the Minnesota courts are politically intertwined with, dependent upon and subject to control by the law firm of Dorsey & Whitney. For political reasons important to Dorsey and the Democratic party in Minnesota, Petitioners' views and legal actions have been wrongfully suppressed.

[Note: Certain facts herein, while not on the record, are well known publicly and are subject to judicial notice. Those facts are submitted on the basis of Howard v. De Cordova, Tex., 20 S.Ct. 817, 177 U.S. 609, to put this case in political context for the Court and demonstrate "purpose".]

B. Manner Of Raising Federal Question In State Court.

First jurisdiction is based on matters which could not be appealed under state court procedure and that concern a federal question reviewable by the United States Supreme Court. Toledo, St. L.&W. R. Co. v. Slovin, Ohio, 35 S.Ct. 306, 236 U.S. 454.

Petitioner is bringing an issue here that could not be decided by the Minnesota Courts. This is because Respondents filed a sanctionable "Response To Petition" to the Supreme Court of Minnesota in reply to the "Petition For Review" and in willful disregard of the Court Of Appeals decision striking a substantial portion of their brief. The Minnesota Supreme Court denied Petitioner's request for certiorari after reviewing Respondents' sanctionable brief. Minnesota rules do not allow a rehearing of petitions for writ of certiorari. MRCAP, Rule 140.01 states that: "No petition for reconsideration or rehearing of a denial of a petition for review provided by Rule 117, or of a petition for accelerated review provided by Rule 118, shall be allowed in the Supreme Court." Petitioner submitted his "Petition For Review" to the Minnesota Supreme Court pursuant to MRCAP, Rule 117, and he is denied any right of reconsideration under Rule 140.01.

The Court Of Appeals decision at page 2, lines 19-22 states, "Appellant has moved to strike portions of respondents' brief that he contends are not part of the record on appeal. We grant appellant's motion with respect to the deposition transcripts contained in respondents' appendix." Respondents then completely disregarded the Court Of Appeals ruling and submitted their identical brief to the Minnesota Supreme Court to defeat Petitioner's request for certiorari. Respondents appellate reply brief substantially violated MRCAP, Rule 128.02. The violations are pervasive, material and seriously prejudicial to Appellant. Respondents' Statement Of

The Case consists of 22 pages and is found at pages 2 to 23 of their brief. Nineteen of those pages contain false assertions that are not on the record. Respondents' appendix includes 32 pages of documents not on the record and improperly used as references throughout the brief. Despite Respondents' clear violation of the appeals court ruling, the Supreme Court did not stike or dismiss Respondents' sanctionable brief. The material in the brief was prejudicial as a matter of law under the appellate court ruling and the Supreme Court's denial of the Petition For Certiorari followed from that court's review of Respondents' prejudicial papers.

At every stage of litigation and appeal the Respondents have committed similar willful violations in the presence of the court with absolute impunity. In his request for review Petitioner informed the Supreme Court that:

"Prejudicial rule violations, misconduct by the attorneys, and the appearance of impropriety by the court in applying a double standard, are thoroughly documented in this case. (See Ptrs.Rsps., A-141-362; Apl.S.C., A-363-394; Ptrs.Mot., Ra-58-78; Ptrs.M.Stk.)"; and,

"The lower courts used a double standard in the application of rules, orders and sanctions throughout the case to cause an unjust harm to Petitioner. The courts put aside well documented instances of prejudicial bad faith and misconduct by Respondents' attorneys, and denied Petitioner's motion for discovery on such grounds, but on the other hand freely sanctioned Petitioner financially and in his discovery on clearly erroneous assumptions and without good cause.

"An exercise of the Supreme Court's supervisory powers, and public scrutiny of this case, are necessary to preserve substantial protective principles and to prevent the application of a double standard in favor of politically powerful and influential law firms such as Dorsey & Whitney. Such concerns have been

presented to the court before, and will be presented in the future unless the Supreme Court intervenes now."

Second, a federal question of due process or equal protection may not be apparent until a pattern of arbitrariness is fully developed. Jurek v. Estelle, C.A.Tex., 593 F.2d 672, rehearing 623 f.2d 929, Cert. denied 101 S.Ct. 1709; Brown v. Western Ry. of Ala., 70 S.Ct. 105, 388 U.S. 294; A conscious exercise of selective enforcement of the law is based on an unjustifiable standard which may be shown by a pattern of arbitrariness, Weinberger v. Salfi, Cal., 95 S.Ct. 2457; Jurek, Id. In this case the record shows that the Minnesota courts either arbitrarily or purposely violated Petitioner's constitutional rights at every level throughout the litigation. That did not become completely apparent until denial of review by the Minnesota Supreme Court and that court's permissive review of Respondents' brief submitted in violation of the Court Of Appeal's decision.

Third, it is fully apparent from the record that the decisions of the lower courts could not have been reached except by disposing of the federal questions raised here. Toledo St.L. & W.R.Co. v. Slovin, Id.; Southwestern Bell Telephone v. State of Okl., 58 S.Ct. 528, 303 U.S. 206; Durley v. Mayo, Fla, 76 S.Ct. 806, 351 U.S. 277 rehearing denied 77 S.Ct. 22. When Petitioner became aware of the unauthorized dismissal of his case, he promptly informed the trial court and the parties by way of a 21 page letter dated November 27, 1991, with supporting affidavits, exhibits and a motion to vacate the dismissal, submitted and filed as part of the court record and pointing out due process and equal protection issues:

"In conjunction with Dorsey's oppressive conduct toward me, the Court's sanctions have resulted in an extraordinary hardship that has prevented me from obtaining even the

simplest element of fairness -- a complete statement by the alleged victim regarding her purported charge against me. On the other hand, the record shows that the Court has allowed every possible leniency in the discovery requests made by Dorsey & Whitney, and in imposing those sanctions against me. The record further shows that the Court has made several nusual rulings in this case that strain and controvert very clear rules of civil procedure." [Nov. 27, 1991 Ltr., p. 13.]

The entire letter discusses the court's permissive posture toward misconduct by Respondents, and sanctions against Petitioner for alleged misconduct by Petitioner's attorney.

With respect to a hearing on fraud evidence Petitioner said: "Due to the oppressive and wrongful conduct of opposing counsel, as described above, I am asking the Court to intervene and conduct an inquiry to prevent fraud. Initially, I am asking for a limited scope inquiry that will involve the review of notes taken at the time of the investigation of accusations of sexual harassment against me, and typed investigation summary documents, and to briefly examine the Defendant Ms. MacRae." [Nov. 27, 1991 Ltr., p. 20.]

"Direct judicial intervention is the only way to stop the wrongful conduct of Dorsey's attorneys and prevent fraud, prevent a serious fraud on the Court, and unravel the complex distortions created by Dorsey & Whitney's attorneys in this case. The Court's inquiry will show that the dismissals in this case and the sanctions against me must be set aside due to the fraud and misconduct of Dorsey & Whitney's attorneys and their clients." [Nov. 27, 1991 Ltr., p. 21.]

"When weighing the equities in determining the Court's action here, the Court should consider that the misconduct of opposing counsel in this case has effectively ruined my entire legal career. I am asking the Court to make an initial inquiry that should require no more than a few hours of the

Court's time and which will reveal the basis of opposing counsels' misconduct."[Nov. 27, 1991 Ltr., p. 21.]

"Following is a discussion of some of the known and alleged acts of misconduct in this case. The case record shows that those acts have caused the Court to provide every leniency to the defendants in their discovery and their efforts to conceal the truth and impose undue sanctions against me. At the same time, the Court has consistently constrained its rules in a manner that has seriously harmed the effectiveness of my discovery and caused the truth to be suppressed. In particular, after nearly three years of litigation the tactics of opposing counsel and the Court's rulings have worked together to prevent, hinder and delay the taking of the deposition of the Defendant Sarah MacRae [the alleged accuser of Petitioner]...and to prevent me from discovering crucial documents that show the falsity of that accusation."

The trial court denied Petitioner's above requests for in camera review, discovery, a separate hearing on the sanction payments, and other matters, and stated that the actions alleged by Petitioner are no more than what attorneys are suppose to do as part of the American system of justice. [The court file notes and recording of these statements disappeared from the court files, but are documented by Court Rptrs. Aff., Aug. 24, 1992, at A-461 to A-463 of Appl. Brf. Apx. of Aug. 30, 1993.]

Excerpts of Petitioner's Memorandum And Affidavit In Response To Defendants' Motion To Strike, dated November 19, 1992, are found at the Appendix, pps. 76 to 96. Due process and equal protection issues were brought to the attention of the trial court by those papers and the later served Application For Order To Show Cause which incorporated those papers by reference. On both filings the court refused Petitioner's right to a hearing and remedy, and ignored the facts and filings which the court would not rule on.

Petitioner's Notice Of Appeal and Statement Of The Case dated July 15, 1992, cited the same underlying due process, equal protection and privilege issues stating in part:

"During the ensuing litigation, the trial court abused its discretion and erred by: preventing Appellant's reasonable and necessary discovery; imposing harsh and unjust sanctions against the Appellant individually for the acts of his attorney; failing to sanction Appellant's and espondent's counsel for blatant misconduct; committing illegal acts of coercion in an attempt to force Appellant to dismiss his lawsuit and to retaliate against the Appellant; and failing to vacate Respondents' Stipulation And Order For Dismissal and Judgment entered thereon."

The appeals court blocked Petitioner's lawful right to his initial appeal, (discussed at prg. (3) above), and allowed Respondents to enter falsified documents in the appeals court without allowing Petitioner his right to contest those documents in the trial court, (discussed at prg. (6) above). That issue was raised by Petitioner's Motion To Correct The Record made to the appeals court pursuant to MRCAP, Rule 110.05, and filed September 4, 1992, and dismissed without consideration by Order filed September 25, 1992, (App. 25). The trial court also refused to consider Petitioner's papers, motions and application on this same matter, (ref. prg. (7) above). [This issue was raised to the trial court by Application for Order to Show Cause dated Nov. 23, 1992.]

Petitioner's renewed Notice Of Appeal and Statement Of The Case served July 23, 1993 discussed the same underlying issues of equal protection and due process as initially presented. Additional questions were raised because of the intervening circumstances of the case including:

"Whether the trial court abused its discretion, or otherwise erred as a matter of law, by denying Appellant's request for a

review of facts and allegations concerning attorney and judicial misconduct, as requested by Appellant for purposes of framing and bringing a motion to vacated the dismissal?

"Did the trial court abuse its discretion, or otherwise err as a matter of law, by following a pattern of unlawful misconduct or oppression so as to attempt to coerce the Appellant to dismiss his suit?"

Petitioner discussed these issues by way of his Brief served August 30, 1993, his Reply Brief served October 12, 1993, and motions served October 25, 1993, October 29, 1993 and November 4, 1993. Relevant portions of those papers are included at the Appendix, pps. 51-75.

The Appellate Court decision of December 13, 1993 affirmed the trial court order. The appeals court found that the trial and appellate court conduct did not "frustrate justice" in this case and in so ruling clearly decided Petitioner's constitutionally guaranteed Fourteenth Amendment rights to due process, equal protection and entitlement to the same privileges as every other citizen. The court denied Petitioner's right to the defense of the Statute of Frauds sections, and Minn.Stat., Sec. 481.08. As to misconduct allegations the court decided that Petitioner "cannot substantiate his assertions" thereby necessarily deciding that Petitioner was not entitled to his discovery rights or even to a lower court hearing on those issues. That decision was determinative of Petitioner's due process, equal protection and entitlement to guaranteed privileges under the law.

Moreover, the Court Of Appeals decided Petitioner's constitutionally guaranteed First Amendment right to free speech and free expression of his opinions. The pattern of violations and misconduct by attorneys and the courts in this case were willful and pervasive. Those acts were clearly oppressive and effectively suppressed Petitioner's First Amendment rights at every stage, including his Petition For Writ to the Minnesota

Supreme Court which was suppressed upon Respondents' submission of their brief in violation of the appeals court decision striking a major portion of their brief.

In his Petition for review by the Minnesota Supreme Court, (specific references cited above), Petitioner restated the violations of his rights. Respondents submitted their sanctionable brief in willful disregard for Petitioner's rights, and the Court Of Appeals ruling to strike their brief. The Petition was denied and in so deciding the Minnesota Supreme Court continued the state's pattern of allowing the further rule and court order violations by Respondents' attorneys. The court necessarily decided Petitioner's constitutionally guaranteed rights to due process, equal protection and entitlement to the same privileges as every other citizen, (Copperweld Steel Co. v. Industrial Comm. of Ohio, 65 S.Ct. 1006, 324 U.S. 780); and acted to further oppress Petitioner's First Amendment rights.

ARGUMENT

I. RIGHT TO JUSTICE AND FOURTEENTH AMENDMENT ISSUES

The lower courts denied Petitioner his right to a jury trial and his right to redress his grievances as guaranteed to him pursuant to the Restructured Constitution of the State of Minnesota, Article I, Sections 2, 4, and 8, (Olson v. Aretz, App. 1984, 346 N.W.2d 178), and the Fourteenth Amendment of the United States Constitution.

Petitioner's vested rights in his career, reputation, cause of action and statutory defenses, and contract claims are at stake in this case. Harlow v. Ryland, D.C.Ark., 78 F.Supp. 488, affd. C.A. 172 F.2d 784; Massa v. Nastri, 3 A.2d 839, 125 Conn. 144. Petitioner is entitled to strict judicial scrutiny by the Court

in its duty to preserve his constitutional rights here. Rep. Pictures Corp. v. Kappler, C.C.A. Iowa, 151 F 2d 543, 66 S.Ct. 523. The lower courts have labeled Petitioner an "obstructionist" and a sexual harasser in denying his constitutional rights. The courts have stated their reluctance to apply their time to Petitioner's pro se motions, (ref: Dist.Crt.Ords. at App. and App. concerning the courts' "scarce" time resources; and Minn.Ct.Apls. Ord. at App. dismissing Petitioner's perfected appeal for purposes of "judicial economy"), and have ignored several duly served and filed papers and motions which factually detail Respondents' prejudicial misconduct, (ref: Cross Motion, Memo., Aff. and Exhs. dated Nov. 19, 1992, at Apl.Brf. pps. A-141 to A-362; Appl. for Ord. to Show Cause dated Nov. 23, 1992, at Apl.Brf. pps. A-363 to A-394; Mot. and Aff. to Supplement the Record submitted to the Ct.Appls. Nov. 10, 1993; Mot. to Correct the Record submitted to the Ct.Appls. Sep. 4, 1992 and to the Dist.Crt. Nov. 23, 1992; and, Minn.Spr.Crt. refusal to acknowledge Ct.Appls.Decis. filed Dec. 21, 1993 at App. 2, striking substantial portions of Rsps.Brf. and Petitioners supporting Motion to Strike dated Oct. 25 and Nov. 4, 1993.) Congestion in the courts is not grounds for denying access to the courts, (Ingram v. Richardson, C.A.Ky., 471 F.2d 1268).

The lower courts have denied Petitioner's request for a few hours of time for an in-camera review of notes which Respondents were found to have willfully concealed from identification and production as required by Petitioner's lawful discovery requests, (ref: Ptrs.Mot. dated Nov. 27, 1991, at Rsps.Brf. RA-58 to RA-78).

The trial court's inability to take the time to acknowledge and act on Petitioner's motions have resulted in documented material errors, as follows: 1) making incorrect assumptions about facts not in evidence, [Note: For example, the court's Order dated March 27, 1992 was based in part on its

seriously mistaken assumption that Petitioner had not paid certain attorney fees of $2000 and court costs of $1000.]; 2) keeping important papers, duly served and filed by Petitioner, off the record, [Note: Ct.Appls. avoidance of Ptrs. Mot. to Supplement the record with respect to documents served and filed, and include on the trial court file index, but which had been lost or misfiled by the trial court.]; 3) allowing Respondents to file falsified affidavits on the record by way of a "sham" motion containing unsigned affidavits without notice of hearing or a hearing on their motion, and which MRCP, Rules 11 and 12.06 require to be sticken, (ref: Ptrs. Motion to Correct the Record, Sep. 4, 1992); 4) denying Petitioners rights under the Protective Order which Respondents have violated at least twice; 5) denying Petitioner's right to a trial as to material facts in dispute in the case; and other prejudicial errors.

Petitioner's protected fundamental rights have been transgressed with impunity and disregarded for purposes of expediency in this case. These are compelling grounds for review. Cleveland Brd. of Ed. v. La Fleur, Ohio, 94 S.Ct. 791, 414 U.S. 632; Armstrong v. Duffy, 103 NE2d 760, 90 Ohio App. 233.

The Restructured Constitution of the State of Minnesota holds the right to a trial by jury inviolate regardless of the amount involved, (Art. I, Sec. 4); grants every person the right to a certain remedy in the laws for all injuries or wrongs to a person, and a person's property or character, (Art. I, Sec. 8); entitles every person to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws, (Art. I, Sec. 8); and secures those rights to every citizen similarly situated, (Art. I, Sec. 2). These are self-executing, (Skelly Oil Co. v. Univ. Oil Prods. Co., 86 NE2d 875, 338 Ill.App. 79), mandatory provisions which have been denied to Petitioner in this case. They are substantive elements of due process in the State of Minnesota

and are further guaranteed to Petitioner by the United States under the due process and equal protection clauses of the Fourteenth Amendment. Hilliard v. Scully, D.C.N.Y., 537 F.Supp. 1084; Ruiz v. Estelle, 679 F.2d 1115 and 688 F.2d 266, cert. denied, 103 S.Ct. 1438.

Repeated sanctions imposed on Petitioner, without due process as to his proof of misconduct by the attorneys in the case, violated Petitioner's right to free justice, without purchase, and imposed a fear of unwarranted sanctions. (Miller v. R.K.A. Mgmt. Corp., 160 Cal.Rptr. 164; U.S. v. Goodwin, 102 S.Ct. 2485, 457 U.S. 368, rehearing, 687 F.2d 44.)

Last, there are substantial material fact disputes to require a jury trial in this case. The settlement agreement documentation, alleged "signature", statutory defenses of Minn.Stat., Secs. 336.8-319, 481.08, and 513.01, circumstances of coercion and misconduct by Respondents, all are matters to be determined by a jury. (Olson, Id.; Wise v. Midtown Motors, 231 Minn. 46, 42 N.W.2d 404.)

II. FREEDOM OF SPEECH AND FOURTEENTH AMENDMENT ISSUES

The lower courts have acted so as to abridge Petitioner's right to the freedom of speech guaranteed to him under the First Amendment to the United States Constitution as incorporated by the Fourteenth Amendment. The courts have acted in a willful manner, with impunity, to transgress Petitioner's fundamental rights through a discriminatory application of political influence here. The courts have suppressed Petitioners discovery and denied his right to put evidence on the record based on its assumptive views that Petitioner's allegations are "preposterous", and the court has "scarce time" to consider the claims, and its seriously mistaken assumptions as to nonpayment of sanctions. (Ref: Dist.Crt.Memos. at App. 7, 29.) The trial court has also

imposed sanctions to suppress Petitioner's discovery, his guaranteed access to justice, and his right to put evidence on the record and have a hearing as to attorney and judicial misconduct in connection with the underlying basis of those sanctions.

The courts are obligated to protect personal rights guaranteed by the state and federal constitutions, and they do not have the authority of the people to overturn those rights because of a difference of opinion as to allegations of political corruption. Breen v. Kahl, D.C.Wisc., 296 F.Supp 702, affd. 419 F.2d 1034, cert. denied, 90 S.Ct. 1836; Byars v. U.S., Iowa, 47 S.Ct. 248, 273 U.S. 28. The lower courts effectively made new law to suppress Petitioner's freedom of expression in this case by denying court access for lawful, duly made motions, applications, appeal (July 1992), and trial by jury. Petitioner's use of the judicial process through litigation to enforce his constitutional rights is a means of expression protected by the First and Fourteenth Amendments, (Edwards v. So. Carolina, S.C. 1963, 83 S.Ct. 680, 372 U.S. 229), and where the inhibition of expression occurs in a preliminary proceeding, with no guaranty of a prompt judicial decision on the merits, the procedure is constitutionally defective, (Grove Press Inc. v. City of Phil., C.A.Pa., 418 F2d 82). The First Amendment applies to the judiciary, (Morgan v. State of Florida, Fl, 1976, 337 So.2d 951), and it affords the broadest protection in the area of political expression, (Gewertz v. Jackman, D.C.N.J., 467 F.Supp. 1047).

Petitioner is entitled to strict judicial scrutiny on these issues, (Chrysler Corp. v. New Motor Vehicle Brd., 153 Cal.Rptr. 135).

Respondents actions have been similarly violative of Petitioner's constitutional right to free speech because of the close intertwining relationship of Respondents' willful misconduct and judicial acquiescence in allowing it with impunity.

III. FOURTEENTH AMENDMENT ISSUES PER SE

The lower courts abridged Petitioner's privileges, deprived him of liberty and property without due process of law, and denied him equal protection of the laws as required by the Fourteenth Amendment to the United States Constitution.

Article IV, Section 2, and the Fourteenth Amendment guaranty the Petitioner the rights and immunities of a citizen and insures him the privilege of having those rights and immunities judicially declared and protected because judicial action was properly invoked as to his motions to protect the record, application for order to show cause, discovery requests, motion to strike, request for in-camera review as to misconduct, raise his defenses of the Minnesota Statute of Frauds and other actions taken by him in this case. Whitney v. Madden, 79 NE2d 593, 400 Ill. 185, cert. denied 69 S.Ct. 55, 335 U.S. 828; Valley Natl. Bk. v. Glover, 159 P.2d 292, 62 Ariz 538. Petitioner was denied his privileges and immunities with respect to his defenses as well. Petitioner's right to raise his statute of frauds defense was denied to him by the lower courts. In the trial court, Petitioner clearly raised his defense and argument as to Minn.Stat., Sec. 481.08, which is essentially a statute of frauds provision regarding an attorney's agreement to settle matters in litigation on behalf of a client. The law and argument were raised in the trial court by Petitioner's Memorandum filed August 4, 1992, (beginning at page A-45 of Appellant's Brief), in response to the court's amended order of July 14, 1992, (App. 27). Minn.Stat., Sec. 481.08 raises the same issues as Minnesota's other statute of frauds provisions. Further, the statute of frauds defense is clearly not required to be raised in Minnesota until a party asserts an oral contract obligation, and no later than the point at which the case goes to a jury, (Bruder v. Wolpert, 178 Minn. 330, 227 N.W. 46, 49 Am.Jur., Stat.Frauds, Sec. 603;

Borchardt v. Kulich, 48 N.W.2d 318). Here, the Respondents consistently argued in the trial court that they had an executed written settlement agreement. On its own argument the trial court found that an oral settlement agreement was the basis of the dismissal of the action, and that the oral understanding was substantiated by the marginal notation appearing on the draft of the proposed written agreement, (Dist.Crt.Ord., App. 17-19). Before making that finding, which raised the assertion of an oral contract for the first time in the case, the court arbitrarily "closed the record" thereby again denying Petitioner's vested right to make his defense, (Dist.Crt.Ord., App. 7, last prg.). The Court Of Appeals erroneously decided that the statute of frauds issue was not brought up in the trial court. Petitioner's references and argument relying on Minn.Stat., Sec. 481.08 were raised in the trial court at Petitioner's Memorandum duly served August 4, 1992, (Apl.Brf., A-45), the argument was raised by both of Petitioners Notices Of Appeal, Appellate Brief, Appellate Reply Brief, and at oral argument made in both the District Court and the Court Of Appeals.

On this matter, the Court Of Appeal's decision filed December 21, 1993, (App. 2), first decided that the statute of frauds defense could not be raised on appeal, and then found that the marginal notation appearing on the proposed draft would have met the statute requirements. The Court Of Appeals was not in a position to make findings of fact on that question. The trial court had not made a finding on that point, and it is a proper question only for a jury in this case. Further, the crucial fact question for the jury is not whether Petitioner's attorney had authority to make a settlement, or whether his signature appears on a marginal notation, but whether the notation was made with a present intention to make a binding agreement. Both courts completely ignored that question as put forth by Petitioner's Memorandum of August 4, 1992, his Appellate and Reply Briefs, and his oral argument.

Petitioner was denied his right to due process under the Fourteenth Amendment because he was denied fundamental principles of fairness involving his discovery, his offer of proof, and his right to a hearing on all actions and defenses explained within this Petition and on the record. (Dukich v. Blair, D.C.Washl, 3 F2d 302, 46 S.Ct. 469.) Petitioner was denied his right to a hearing as to his allegations of misconduct by his own attorney in not paying certain sanctions which he had been reimbursed by Petitioner and instructed to pay to the court, and as to the underlying imposition of the sanctions in the first place. All of these issues were raised in the trial court and were duly put forth to the Court Of Appeals. [Note: Petitioner's Motion of Nov. 27, 1991 raised all of these issues, and the resulting judgment, in failing to address the issues did not make them less viable on Petitioner's timely perfected appeals.] Petitioner was denied his right to raise or litigate the facts involving Respondents' Protective Order violations, misrepresentations, and other misconduct documented by Petitioner's papers served and filed in the case.

Petitioner was denied his right to due process by Judge Burke who was required to recuse himself pursuant to MRCP, Rule 63.02 because of his personal friendship with Judge Sommerville, whose conduct was being reviewed on reconsideration by Judge Burke, under special arrangement between Judge Burke and Judge Sommerville made outside of the day-to-day policies and procedures of the trial court assignment office. Petitioner was denied due process by Judge Burke, who stated at a hearing held January 11, 1992 and by his Order dated March 27, 1992, (App. 7), that Petitioner's offer of proof of bribery, and misrepresentation, (including the discovered concealment by Respondents of summary notes which they had been required to identify and produce), and coercion were not justiciable because such allegations represented nothing more than what good attorneys are allowed to do under the American system of justice. Petitioner

was denied due process, by Judge Burke because he did not have the time to properly aprize the facts, as shown by the statements in the orders dated March 27, 1992 and April 1, 1993, and by seriously mistaken assumptions documented on the record. The Court Of Appeals denied due process in dismissing Petitioner's initial appeal of right for purposes of "judicial economy", (Ord., App. 5). The trial court denied due process in sanctioning Petitioner for his refusal to accept a "nuisance settlement" offer. The trial court deprived Petitioner of due process by further sanctioning him for asking reconsideration of the sanction order, and then base on the court's mistaken assumption that Petitioner had not paid the court sanctions to his attorney, the parties and the court. [Note: Certain attorney fees were not paid based on documented letter agreement between counsel, pending completion of Petitioner's discovery depositions which have been blocked by the court.]

Petitioner was denied due process by Respondents in their failure to produce a statement by an alleged victim, when they fired him without regard to his express contract rights and labeled him a sexual harasser. (Van Zandt v. McGee, C.A.La., 202 F2d 490; Stockler v. Mich., 98 S.Ct. 1598.) Respondents and the courts have continued that violation because of their willful prevention of Petitioner's lawful discovery by deposition of the alleged victim, and of investigation notes and summary notes wrongfully concealed by Respondents with impunity from admonition by the courts. The courts protective standard toward Respondents is state action in this case. (Reitman v. Mulkey, Cal., 87 S.Ct. 1627.)

Petitioner has been denied equal protection under the law guaranteed to him by the Fourteenth Amendment because he has been denied equal access to the courts in this case. (State v. Northwestern Prep. Sch., 37 N.W 2d 370; State v. Pehrson, 287 N.W. 313. Respondents have violated court rules at every level of this litigation from the time they filed their late Answer more than one year after it was due under MRCP, Rule 12.01,

through the date of their last filing of a prejudicial brief to the Minnesota Supreme Court in violation of the Court Of Appeals decision striking it. Respondents' misconduct and rule violations were put to the attention of the trial court, Court Of Appeals, and Minnesota Supreme Court. Each tribunal ignored Petitioner's fundamental right to assert the rules and statute provisions against Respondents, thereby giving them absolute control over the litigation without regard to common principles of law and equity. (Thomas Oil, Inc. v. Onsgaard, 215 N.W.2d 793.) At the same time, the courts imposed a separate standard on Petitioner, the courts have denied Petitioner his defenses, sanctioned him on mistaken assumption without a hearing, and granted every meaningful motion made by Respondents whether properly made or not. The lower courts have exercised their discretion without observance of the general rules established for the security of private rights. (Valley Natl. Bk. of Phoenix v. Glover, 159 P2d 292; Hagar v. Reclamation Dist., 4 S.Ct. 663.)

The lower courts' denial of due process, equal protection, equal access to justice, suppression of disapproved viewpoints, and unchecked oppression of Petitioner throughout this litigation demonstrates the unwillingness of Minnesota Courts to protect those constitutional guarantees that are in place to prevent corruption. Petitioners appeal should be granted to afford him the guaranties of liberty he is entitled to for the protection of his vested rights, and to prevent the insidious erosion of those rights for the benefit of all citizens.

Respectfully submitted,

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Supreme Court, U.S.
FILED

931919 MAY 25 1994

OFFICE OF THE CLERK

No._____

In the Supreme Court Of The United States

October Term 1993

DARYL J. BERGMANN,

Petitioner,

v.

LEE DATA CORPORATION, a Minnesota corp., now known as Apertus Technologies, Inc., ROBERT GORDON, SARAH MacRAE, GARY WHITE, ROBERT BESINGER and BRIAN KOVALCHUK;

Respondents.

Petition For Review Of Decision Of Court Of Appeals To The Supreme Court For The State Of Minnesota

PETITIONER'S APPENDIX
Volume I of I

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110 pp

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The following page is unavailable for filming;

pg. i

TABLE OF CONTENTS TO APPENDIX

Page

CAPTION i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINIONS SOUGHT TO BE REVIEWED 1

Minnesota Supreme Court
Order Dated February 24, 1994 1

Minnesota Court Of Appeals
Decision Filed December 21, 1993 2
Order Filed September 1, 1992 5

Minnesota District Court, 4th Dist.
Order and Memorandum
Dated April 1, 1993 7

OTHER OPINIONS IN THE CASE 23

Minnesota Court Of Appeals
Order Filed August 19, 1993 23
Order Filed September 25, 1992 25

Minnesota District Court, 4th Dist.
Amended Order
Filed July 14, 1992 27
Order and Memorandum
Dated March 27, 1992 29

TABLE OF CONTENTS TO APPENDIX

Page

REFERENCED STATUTES AND PROVISIONS 42

Minnesota Rules Of Civil Procedure 42
MRCP, Rule 6.04 42
MRCP, Rule 7.02 42
MRCP, Rule 11.00 43
MRCP, Rule 12.06 44
MRCP, Rule 41.02 44
MRCP, Rule 52.01 45
MRCP, Rule 63.02 45

Minnesota General Rules Of Practice For District Courts 46
MGRP, Rule 115.02 46
MGRP, Rule 116.00 46

Minnesota Rules Of Civil Appellate Procedure 46
MRCAP, Rule 103.03 46
MRCAP, Rule 104.01 46
MRCAP, Rule 108.03 47
MRCAP, Rule 110.05 47
MRCAP, Rule 128.02 47
MRCAP, Rule 128.03 48
MRCAP, Rule 140.01 48

Minnesota Statutes Sections 49
Minn.Stat., Sec. 336.8-319 49
Minn.Stat., Sec. 481.08 49
Minn.Stat., Sec. 513.01 50
Minn.Stat., Sec. 588.04 50

TABLE OF CONTENTS TO APPENDIX

Page

EXCERPTS OF MEMORANDA PURSUANT
TO USSC, RULE 14.1(h) 51

Petitioner's Memorandum
Dated Oct. 29, 1993
[Pages 3 to 5] 51

Petitioner's Memorandum
Dated Oct. 25, 1993
[Pages 15 to 17] 53

Petitioner's Reply Memorandum
Dated Nov. 4, 1993
[Pages 8 to 10] 56

Petitioner's Reply Brief
Dated Oct. 12, 1993
[Pages 5 to 18] 58
[Pages 24 to 25] 72

Petitioner's Appellate Brief
Dated Aug. 30, 1993
[Pages 45 to 48] 73

Petitioner's Memorandum And Affidavit
Dated Nov. 19, 1992
[Pages 9 to 17] 76
[Pages 47 to 63] 83

APPENDIX
TABLE OF AUTHORITIES

Case **Page**

Albert v. Edgewater Beach Bldg Corp.
218 Minn. 20
15 N.W.2d 460 (1944) 75

Altomare v. Altomare
513 A.2d 486
355 Pa.Super. 391 (1986) 60

Alvarado-Morales v. Digital Equipment Corp.
843 F.2d 613, 618 (1st Cir. 1988) 21

Atwood v. Holmes
229 Minn. 37
38 N.W.2d 62 (1949) 59

Austin Farm Center, Inc. v. Austin Grain Co.
418 N.W.2d 181, 184
(Minn.App. 1988) 14, 35, 37, 64, 71

Bartholet v. Berkness
291 Minn. 123
189 N.W.2d 410 (1971) 62

Bauman v. Metzger
145 Minn. 133
176 N.W. 497 (1920) 59

Beach v. Anderson
417 N.W.2d 709
(Minn.App. 1988) 64, 69

APPENDIX
TABLE OF AUTHORITIES

Case **Page**

Becker v. Messner
175 Minn. 471
221 N.W. 724 (1928) 75

Bergmann v. Hanson
CT-91-12540
(Minn., 4th Jud.Dist.) 77, 87

Bergstrom v. Sears, Roebuck Co.
532 F.Supp. 923, 933
(D.Minn. 1982) 3, 11, 13, 15, 38, 40, 63, 64

Borchardt v. Kulick
234 Minn. 308, 320-21
48 N.W.2d 318, 326
(1951) 3, 60, 61, 62, 65

Bruder v. Wolpert
178 Minn. 330
227 N.W. 46 60

Chicago M.&St.Paul Ry. v. Sprague
140 Minn. 1
167 N.W. 124 (1918) 58

Chizmadia v. Smiley's Pt. Clinic
428 N.W.2d 459
(Minn.Ct.App. 1988) 57

Christianson v. Hager
242 Minn. 41
64 N.W.2d 35 (1954) 58, 62

APPENDIX
TABLE OF AUTHORITIES

Case	Page
Clark v. Crossroad Center, Inc. 285 Minn. 173 172 N.W.2d 560	70
Cohen V. Mirviss Mfg. Co. 173 Minn. 100 216 N.W. 606 (1927)	95
Dataserve Equip. Inc. v. Tech. Fin. Leasing Corp. 364 N.W.2d 838.	70
Ecklund v. Vincent Brass and Aluminum Co. 351 N.W.2d 371 (Minn.App. 1988)	67
Fulgence v. J.Ray McDermatt & Co. 662 F.2d 1209	64
Ghostley v. Hetland 204 N.W.2d 821	64
Greer v. Koviker 253 N.W.2d 133	69
Hagedorn v. Aid Ass'n. for Lutherans 211 N.W.2d 154, 157 (Minn. 1973)	12, 13
Hart v. Bell 222 Minn. 69 23 N.W.2d 375 24 N.W.2d 41	59, 60

APPENDIX
TABLE OF AUTHORITIES

Case **Page**

Hillmeyer v. Watz
415 N.W.2d 89 64

Holen v. Mpls. St. Paul Metro. Arprts. Comms.
250 Minn. 130
84 N.W.2d (1957) 58

Hornblower & Weeks-Hemphill Noyes v. Lazere
222 N.W.2d 799 40

In re AW's Welfare
399 N.W.2d 223
(Minn.Ct.Apppls. 1987) 95

In re R.L.W.
309 Minn. 489
245 N.W. 232 (1976) 95

Jallen v. Agre
119 N.W.2d 739 ..... 64, 75

Johnson v. Froelich
196 Minn. 81
264 N.W. 232 (1935) 95

Johnson v. St. Paul Ins. Cos.
305 N.W.2d 571, 573 33
(Minn 1981)

Johnson v. Sitzmann
413 N.W.2d 541 ..... 15, 36, 64
(Minn. App. 1987)

APPENDIX
TABLE OF AUTHORITIES

Case **Page**

Keller v. Wolf
239 Minn. 397
58 N.W.2d 891 (1953) 75

Kittler & Hedelson v. Sheehan Prpts. Inc.
295 Minn. 232
203 N.W.2d 825 (1973) 94

Kuykendall v. Rockwell Intl. Corp.
20 Empl.Prac.Dec. 30
(Feb. 27, 1979, C.D. Cal.) 67

Lally v. Crookston Lumber Co.
85 Minn. 257
88 N.W. 846 65

Laserage Technologies Corp. v. Laserage Laboratories, Ind.
972 F.2d 799
(7th Cir. 1992) 60

Martindell v. Intl. Tel. & Telg. Corp.
594 F.2d 291
(C.A.N.Y. 1979) 95

McDonald v. Johnson & Johnson
722 F.2d 1370 (8th Cir. 1983)
cert. denied 469 U.S. 870 (1984) 69

McGee v. Breezy Pt.Est.
283 Minn. 10, 22
166 N.W.2d 81, 89 (1969) 2, 12

APPENDIX
TABLE OF AUTHORITIES

Case	Page
Meisner v. Meisner 220 Minn. 559 20 N.W.2d 486 (1926)	74
Merle's Costr. Co. v. Berg 442 N.W.2d 472 (Minn.Ct.App. 1989)	57
Mill Pond Towers, Inc. v State Dept.Nat.Rsrcs. 406 N.W.2d 2 (Minn.Ct.App. 1987)	59
Minn. St. Bar Assc. v. Divorce Asst. Assc. 248 N.W.2d 733 (1976)	95
Mullin v. Minkel 177 Minn. 42 224 N.W. 255 (1929)	75
Myers v. Feckler Co. 312 Minn. 469, 474 252 N.W.2d 595, 599 (1977)	2
Northwestern Natl. Bk. Swst. v. Lectro Systems, Inc. 262 N.W.2d 678 (Minn. 1977)	59
Nybladh v. Peoples State Bank 247 Minn. 88 76 N.W.2d 492 (1956)	75

APPENDIX
TABLE OF AUTHORITIES

Case	Page
Pow-Bel Const. Corp. v. Gondels 291 Minn. 386 192 N.W.2d 812 (1972)	94
Roaderick v. Lull Engr'g. Co. 296 Minn. 385 208 N.W.2d 761	65
Rooney v. South Sioux City 111 Neb. 1 195 N.W. 474, 475	68
Rosenberg v. Townsend, Rosenberg & Young 376 N.W.2d 434 (Minn.Ct.App. 1985)	37, 65
Rural American Bank v. Herickhoff 473 N.W.2d 361 (Minn.App. 1981)	70
Ryan v. Ryan 193 N.W.2d 295	68
Safeco Ins. Co. v. Diaz 385 N.W.2d 845 (Minn.Ct.App. 1986)	57
Schumann v. Northtown Ins. Agency, Inc. 452 N.W.2d 482, 484 (Minn.Ct.App. 1990)	34, 35, 37, 38

APPENDIX
TABLE OF AUTHORITIES

Case	Page
Semrad v. Edina Realty, Inc. 470 N.W.2d 135, 144 (Minn.Ct.App. 1992)	12
Skalbeck v. Agristor Leasing 384 N.W.2d 209, 213 (Minn.Ct.Ap 1986)	36, 38, 65
Spicer v. Carefree Vacations, Inc. 370 N.W.2d 424, 425 (Minn. 1985)	6
State v. Bucholz 169 Minn. 226 210 N.W. 1006 (1926)	75
Stockdale Bancorp. v. Kjellberg 479 N.W.2d 438 (Minn.App. 1992)	5
Swift and Co. v. United Packing House Workers 228 Minn. 571 37 N.W.2d 831 (1949)	95
Theis v. Theis 135 N.W.2d 740	64
Tomson v. Stephan 696 R.Supp. 1407 (D.Kan. 1988)	67

APPENDIX
TABLE OF AUTHORITIES

Case	Page
Tonka Tours, Inc. v. Chadima 372 N.W.2d 723, 727 (Minn. 1985)	3
True Share Sys. v. Schmidt 397 N.W.2d 483 (Minn.Ct.Appls. 1986)	95
U.S. v. Rylander 460 W.S. 752 (1983)	74
Upton Mill & Elevator Co. v. Baldwin Flour Mills 147 Minn. 205 179 N.W. 904 (1920)	70
Wilson' Inc. v. Twin City Freight Inc. 378 N.W.2d 117 (Minn.Ct.App. 1985)	75
Wise v. Midtown Motors 231 Minn. 46 42 N.W.2d 404	75
Wodd v. Bary 179 Minn. 208 271 N.W. 447 (1937)	94
Worwa v. Solz Enterprises, Inc. 238 N.W.2d 628, 630 (1976)	67

APPENDIX
TABLE OF AUTHORITIES

Reference **Page**

Am.Jur. 2d, Agency
Secs. 74, 76 (1962) 12, 39, 60

Dunnell's Minn. Dig., 4th Ed.
Vol. 2, p. 342, Sec. 5.02 58

Dunnell's Minn. Dig., 2d Series,
Vol. 17B, p. 264 65

OPINIONS SOUGHT TO BE REVIEWED

STATE OF MINNESOTA
IN SUPREME COURT
C8-93-1526
Filed February 24, 1994

Daryl Bergmann, Appellant

vs.

Lee Data Corporation, et al, Respondent, Sarah A. MacRae, Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Daryl J. Bergmann for further review be, and the same is, denied.

Dated: February 24, 1994

BY THE COURT:
AM Keith
(Signed)
Chief Justice

STATE OF MINNESOTA
IN COURT OF APPEALS
C8-93-1526
Filed December 21, 1993

Daryl Bergmann, Appellant,

vs.

Lee Data Corporation, et al, Respondent, Sarah A. MacRae, Respondent.

Considered and decided by Kalitowski, Presiding Judge, Randall, Judge, and Davies, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant contends the district court erred in enforcing a settlement agreement against him. We disagree and affirm.

DECISION

Appellant contends the district court erred in enforcing a settlement agreement against him. The decision to vacate a settlement stipulation rests largely within the district court's discretion and will not be reversed unless "the court acted in such an arbitrary manner as to frustrate justice." Myers v. Fecker Co., 312 Minn. 469, 474; 252 N.W.2d 595, 599 (1977).

First, appellant contends his counsel had neither apparent nor express authority to settle this case. We disagree. The conduct of appellant's counsel during settlement negotiations resulted in apparent authority. See McGee v.

Breezy Point Estates, 283 Minn. 10, 22; 166 N.W. 2d 81, 89 (1969). Because respondents were justified in assuming appellant's counsel had authority to settle, appellant will not be permitted to prove his counsel's authority was, in fact, less extensive. See Bergstrom v. Sears, Roebuck and Co., 532 F.Supp. 923, 933 (D.Minn. 1982).

We further conclude that appellant's counsel had express authority to settle this matter. The district court's determination that appellant admitted his counsel had "complete control over the litigation: and his counsel averred that appellant had expressly authorized the settlement and dismissal of the lawsuit, are findings of fact supported by the evidence. See Austin Farm Center, Inc. v. Austin Grain Co., 418 N.W.2d 181, 184 (Minn.App. 1988).

Second, appellant contends the parties never entered into a binding contract. We disagree. The district court's determination that appellant accepted the contract will not be overturned unless clearly erroneous. See Tonka Tours, Inc. v. Chadima, 372 N.W.2d 723, 727 (Minn. 1985). Appellant argues that he did not sign the settlementand his counsel's signature did not constitute acceptance. Because we found that appellant's counsel had authority to settle, we conclude the district court did not err in rejecting appellant's argument.

Third, appellant contends for the first time on appeal that the statute of frauds precludes enforcement of the settlement agreement. We disagree. Because the statute of frauds is an affirmative defense which is waived if not raised, we need not consider it. See Borchardt v. Kulick, 234 Minn. 308, 320-21; 48 N.W.2d 318, 326 (1951). Even if we address the merits, we conclude that the signature of appellant's counsel on the written settlement agreement satisfied the statute of frauds. See Minn.Stat. S 513.01 (1992); Minn.Stat. S 336.8-319 (1992).

Fourth, appellant asserts that respondents' counsel, his own counsel, and the district court committed misconduct and that, as a result, the settlement agreement should be set aside. We disagree. Because appellant cannot substantiate his assertions, we conclude that the district court properly rejected appellant's allegations. Appellant has moved to strike portions of respondents' brief that he contends are not part of the record on appeal. We grant appellant's motion with respect to the deposition transcripts contained in respondents' appendix. We deny appellant's motion in all other respects.

Affirmed.

Thomas Kalitowski
(Signed)
12-13-93

STATE OF MINNESOTA
IN COURT OF APPEALS
C1-92-1292
Filed September 1, 1992

Daryl Bergmann, Appellant,

vs.

Lee Data Corporation, et al, Respondent, Sarah A. MacRae, Respondent.

ORDER

Considered and decided by Wozniak, Chief J., Lansing, J., and Amundson, J.

BASED UPON THE FILE, RECORD AND PROCEEDINGS HEREIN, AND FOR THE FOLLOWING REASONS:

This appeal was taken from an April 16, 1992 judgment entered on the denial of a motion to vacate a prior judgment. Respondents move to dismiss.

The pretrial discovery sanction orders challenged by appellant would have been reviewable on appeal from the final judgment. Stockdale Bancorp. v. Kjellberg, 479 N.W.2d 438 (Minn.App. 1992). Because the orders were issued prior to entry of the judgment of dismissal, and the time to appeal from that judgment has expired, they are no longer appealable. Minn.R.Civ.App.P. 104.02.

The April 16, 1992 judgment denying appellant's motion to vacate is independently appealable, because the issues raised in the motion would not have appeared in the record leading to entry of the October 1991 judgment of dismissal and the issues could not have been raised on a direct appeal

from that judgment. See Spicer v. Carefree Vacations, Inc., 370 N.W.2d 424, 425 (Minn. 1985). However, the issues presented in the motion are still pending in the trial court, which has indicated it will reconsider the matter. In the interests of judicial economy, review should await the outcome of that reconsideration.

IT IS HEREBY ORDERED:

1. Respondents' motion to dismiss is granted in part.

2. Appellant's attempted challenge to orders issued prior to the October 1991 judgment of dismissal is dismissed.

3. The portion of the appeal relating to issues presented and decided in the motion and order to vacate the judgment of dismissal is dismissed, without prejudice to the appellant's right to perfect a timely new appeal from the order or judgment resulting from the pending proceedings to reconsider. On any such appeal, the April 16, 1992 judgment shall be within our scope of review, and appellant's statement of the case shall cite this order as the jurisdictional basis for review of that judgment.

Dated: August 31, 1992

BY THE COURT
Ch.J. Wozniak
(Signed)

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUD. DIST

MC 89-12254
Dated April 1, 1993

Daryl J. Bergmann, Plaintiff,

vs.

Lee Data Corporation, et al, Defendants.

ORDER AND MEMORANDUM

The above entitled matter came before the Hon. Kevin S. Burke, Chief Judge of District Court, pursuant to an order dated July 14, 1992, in which this court granted reconsideration on defendant's motion to enforce the purported settlement agreement between the parties.

While reconsideration of defendant's motion to enforce was pending before this court, several other motions were made by the parties. First, plaintiff made two separate motions to supplement the record with a statement of proceedings from April 17, 1991, and a statement of proceedings from January 14, 1992, pursuant to Minn.R.Civ.App.P. 110.03. Second, defendants filed objections to the statements of proceedings from April 17, 1991, and January 14, 1992. Lastly, defendants moved the court to strike plaintiff's Memorandum of Facts and Law (dated August 4, 1992), and Affidavit of Daryl J. Bergmann (dated August 3, 1992), pursuant to Minn.R.Civ.P. 12.06.

The court continued to receive correspondence pertaining to this case up until the end of November 1992, when the record was finally closed.

Plaintiff submitted materials to this court pro se. Roy Ginsburg, Esq. and Karen Maki, Esq. submitted materials on behalf of the defendants Lee Data Corporation (now known as Apertus Technologies), Robert Gordon, gary White, Robert Besinger, and Brian D. Kovalchuk. Defendant Sarah A. MacRae is represented by the law firm of Chrastil and Steinberg, and joined in the submissions made on behalf of the other defendants.

Based upon the files and records herein, the court makes the following:

ORDER

1. Defendants' motion to enforce the settlement agreement is GRANTED.
2. Defendants' motion to strike from the record plaintiff's Memorandum of Facts and Law (dated August 4, 1992), and affidavit of Daryl J. Bergmann (dated August 3, 1992) is DENIED.
3. Plaintiff's motions to supplement the record, with statement of proceedings from April 17, 1992, and January 14, 1992, are DENIED.
4. The attached memorandum is hereby incorporated and made a part of this order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 1, 1993

BY THE COURT:
Kevin S. Burke
(Signed)

MEMORANDUM
April 1, 1992
Background

This case is once again before this court for determination of the validity of a purported settlement agreement between

the parties pursuant to this court's Order dated July 14, 1992. Reconsideration of the validity of the settlement agreement is the next step in this long and complex lawsuit. At this time, the court finds it unnecessary to cover old ground by detailing the complete history of this dispute. (Ftnt. See, this court's Order and Memorandum dated March 27, 1992, for a full procedural and factual history of this case.)

Currently what is relevant are the questions detailed in the Order of this court dated July 14, 1992, when both parties were requested to submit affidavits and memoranda of law on the following issues:

1) whether plaintiff paid Judge Sommerville's court ordered sanctions,

2) whether plaintiff paid $1000 in court ordered sanctions,

3) whether plaintiff was required to pay sanctions before completion of his discovery, and

4) the legal effect of the settlement agreement having a line requiring plaintiff's signature.

With these issues in mind, the court will first determine whether the alleged settlement agreement between the parties is valid and then discuss the other motions of the parties.

Analysis

I. Motion to Enforce Settlement Agreement

Plaintiff raises a myriad of reasons why the purported settlement agreement should not be enforce by this court. besides claiming that his attorney did not have express or apparent authority to enter into any settlement agreement,

plaintiff argues that he personally did not enter knowingly and voluntarily into the settlement agreement, that his signature was expressly required on the settlement agreement and finally that no contract was formed between the parties.

A. Express Authority

All of plaintiff's arguments for not enforcing the settlement agreement belie the fact that, as acknowledged in prg. 12 of plaintiff's Affidavit of August 3, 1992, Alan Greenberg ("Greenberg"), as plaintiff's attorney for more than two years in this matter, had at some point "complete control over the litigation." This court, as trier of fact, previously determined that Greenberg's testimony was more credible on the issue of express authority to settle this case than that of the plaintiff. Order of March 27, 1992, page 6. No evidentiary submission on the motion to reconsider has changed the court's view that Greenberg had express authority to settle any claim on behalf of the plaintiff at the time the settlement agreement was made. Thus, the settlement agreement between the parties to this case should be given its full effect since Greenberg had the express authority of ettlement by the plaintiff.

B Apparent Authority

This court has also previously ruled that Greenberg had apparent authority to negotiate all terms of the settlement agreement and plaintiff did nothing to terminate that authority. Plaintiff now asserts that Mr. Greenberg's apparent authority was less extensive than full settlement authority. See Letter from Daryl Bergmann to Hon. Kevin Burke dated May 26, 1992.

All of the terms of the settlement agreement were negotiated in the same context, Greenberg dealing with the defendants' attorneys without personal involvement by the plaintiff, yet

plaintiff asks that this court find that defendant's reliance on Greenberg authority was reasonable as to some terms but not as to others. Defendants contend that plaintiff is estopped from asserting that Greenberg's authority was less extensive than plaintiff led defendants to believe, citing Bergstrom v. Sears Roebuck & Co., 532 F.Supp. 923 (D.Minn. 1982). This court agrees with defendants.

Plaintiff references the "agreement form" between the parties which states that it is governed by Minnesota law.

He asserts that since Bergstrom and related cases cited by defendants are federal cases and not "Minnesota law", they are not applicable in the interpretation of the agreement. While it is true that Bergstrom is a federal case based on the federal rules, plaintiff's claim is without merit.

First, this court explicitly recognized in its Memorandum of March 27, 1992, that "Bergstrom was a case in federal court, and has not yet been cited by any Minnesota state appellate court. This court, however, finds the reasoning persuasive. Minnesota state appellate courts have recognized the doctrine of apparent authority." (emphasis added) (citation omitted) See Memorandum of March 27, 1992, at 11.

Second, plaintiff's claim might have some validity if the principles announced in Bergstrom were inconsistent with Minnesota law. However, they are not. Although the Bergstrom court cites Am.Jur. as authority, the principles cited by the court are reflected almost precisely in Minnesota case law. The Bergstrom court stated:

"Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in assuming that such agent has authority to perform a particular act and deals with the

agent on that assumption, the principal is estopped as against such third person from denying the agent's authority; he will not be permitted to prove that the agent's authority was, in fact, less extensive than that with which he was apparently clothed."

Bergstrom, 532 F.Supp. at 933 (quoting 3 Am.Jur. 2d Agency S 76 (1962)).

The Minnesota Supreme Court has adopted the Restatement (Second) of Agency S 27 definition of apparent authority:

"Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him"

Semrad v. Edina Realty, Inc., 470 N.W.2d 135, 144 (Minn.Ct.App. 1992) (citing Hagedorn v. Aid Ass'n. for Lutherans, 211 N.W.2d 154, 157 (Minn. 1973). The Minnesota Supreme Court has also stated:

"Thus, if a principal acts or conducts his business, either intentionally or through negligence, or fails to disapprove of the agent's acts or course of action so as to lead the public to believe that his agent possesses authority to act or contract in the name of the principal, the principal is bound by the acts of the agent within the scope of his apparent authority as to persons who have reasonable grounds to believe that the agent has such authority and in good faith dealt with him."

McGee v. Breezy Point Extates, 166 N.W.2d 81, 89 (Minn. 1969) (citing 3 Am.Jur. 2d Agency S 74).

While the particular language used may be somewhat different in Bergstrom, the principles and ideas are identical to that expressed by the Minnesota Supreme Court in McGee and

Hagedorn. Greenberg entered into a settlement agreement on behalf of the plaintiff with defendants who reasonably believed he had the authority to do so. Even if, as plaintiff contends, he limited Greenberg's settlement authority, he never communicated any such limitation to the defendants before the settlement agreement was made.

Plaintiff has not produced, by the materials submitted for this reconsideration motion, any new evidence that this court was incorrect in relying on the reasoning in Bergstrom or that Greenberg's apparent authority was less extensive than full settlement authority. In his Memorandum of Law plaintiff claims bad faith on the part of Greenberg should result in the settlement agreement being unenforceable. See, plaintiff's Memorandum of Fact and Law dated August 4, 1992, page 8. This court, relying on the affidavits, finds more persuasive the accounts given by Greenberg and Roy A. Ginsburg, the attorneys involved in the negotiation the settlement agreement on September 27, 1991, than the account given by the plaintiff in an unsworn, transcribed conversation he allegedly had with Greenberg. Accusing two officers of the court of acting in concert to dismiss claims because they knew plaintiff would never voluntarily dismiss the claims himself is preposterous. Moreover, defendants should not be punished for any alleged misdeeds or negligence by Greenberg as plaintiff's agent. As a result, this court sustains its earlier alternative ruling that Greenberg had the apparent authority to enter into the settlement agreement for the plaintiff.

C. Terms of the Agreement Prohibit Enforcement

1. Personal Action By Plaintiff Was Required

A further argument by the plaintiff for non-enforcement of the settlement agreement is that the express terms of the

settlement agreement form require personal action on his part before any such agreement can be binding on him.

First, plaintiff specifically cites prg. 10 of the settlement form which states, "Mr. Bergmann specifically acknowledges that he enters into this Settlement Agreement and General Release in a knowing and voluntary manner." Using this quoted language, plaintiff makes the argument that only he personally and individually could authorize the agreement to be binding on him.

In evaluating the plaintiff's argument, this court believes it relates more to a claim of coercion or fraud. However, a fraud argument by the plaintiff has previously been dismissed by this court as unfounded in its Order and Memorandum of March 27, 1992. Plaintiff's attempt to use the language "knowing and voluntary manner" as a requirement for personal accession to the settlement agreement is untenable.

Attorneys, as agents for clients, can enter into a stipulation to settle and compromise a client's right of actions with express authorization from the client. Austin Farm Center v. Austin Grain Co., 418 N.W.2d 181 (Minn.Ct.App. 1988). Implicit in granting attorneys the right to settle their clients claims, is an understanding that the client authorizes such a settlement and is knowing and voluntarily entering into the settlement through his or her attorney. The language in prg. 10 of the settlement agreement is merely a written recital of the requirement that, if an attorney is the person agreeing to the settlement, the attorney has the authority of his or her client. By this court's prior alternative holdings that Greenberg had express and apparent authority to settle the claims of the plaintiff, this court implicitly acknowledges that plaintiff knew and approved of the settlement agreement.

Related to plaintiff's argument is one of the issues raised by the court in its Order of July 14, 1992, namely the effect of a

signature line for plaintiff on the settlement agreement. Defendants argue that the signature line has no effect since Greenberg, as an agent for the plaintiff, orally agreed to accept the material terms of the agreement even before it was in writing. Plaintiff's Memorandum August 4, 1992, page 14.

Defendants further argue that obtaining plaintiff's signature was a ministerial task which should not affect the validity of the settlement agreement, relying on Bergstrom for support. Id.

The court is persuaded by defendants' argument. Greenberg, as plaintiff's attorney, did have the authority to orally agree to a settlement agreement which would bind his client. Johnson v. Sitzmann, 413 N.W.2d 541 (Minn.App. 1987). Merely transferring the oral agreement to written form does not change the fact that a settlement had been reached. Before anything had been reduced to writing, the parties had already perfected a settlement of this case through their attorneys. To invalidate the agreement merely because of a signature line in the after prepared written agreement seems ludicrous to this court. Greenberg's oral settlement of plaintiff's claims, through his express and apparent authority, makes the lack of plaintiff's signature on the memorialization of the settlement agreement immaterial.

Plaintiff further argues that he was required to sign the settlement agreement because he appeared in the case, and therefore no voluntary dismissal in this case is valid without his signature. See, Minn.R.Civ.P. 41.01(a)(2). The court is not persuaded by plaintiff's argument since it is premised on the incorrect assumption that plaintiff had appeared in this action prior to the settlement agreement.

Plaintiff claims that a letter he sent to counsel of defendant Brian Kovalchuk constitutes an appearance in this case. A party does appear in an action when he or she serves or files any paper in the proceeding. Minn.R.Civ.P. 5.01.

However, this court does not agree with plaintiff's interpretation of Rule 5.01 based upon the facts of this case. The letter plaintiff sent to defendant Kovalchuk's attorney was not serving or filing a paper in this case. The letter was merely ex-parte communication by plaintiff and did not constitute the service or filing envisioned by Rule 5.01. Thus, because plaintiff did not appear in this matter before the settlement agreement was made, his signature as a party was not required on the agreement.

Personal action on the part of the plaintiff was not required for the settlement agreement to be valid. This court's holding that Greenberg had both express and apparent authority to enter into the settlement agreement on plaintiff's behalf makes any such action unnecessary.

2. Stipulation and Order for Dismissal

Plaintiff argues that the Stipulation and Order for Dismissal signed by the parties to this case is strictly prohibited by the express terms of the settlement agreement and therefore is invalid.

All parties agree that the dismissal stipulation is based on the settlement agreement. Plaintiff cites prg. 7 of the settlement agreement which states:

"There are no covenants, promises, undertakings, or understandings outside of this Settlement Agreement and General Release other than as herein specifically set forth. Any modification of, or addition to, this Settlement Agreement and General Release must be in writing, signed by all parties."

Plaintiff uses this provision as the basis for arguing that the Stipulation for Dismissal is a modification and as such should have been drafted as an amendment to the agreement, with all parties also being required to sign.

This court cannot take the disingenuous view of a dismissal stipulation that plaintiff proposes. Upon reading the clear language of the settlement agreement, it is obvious that prg. 7 envisioned outside agreements other than a stipulation for dismissal. To read prg. 7 as prohibiting stipulations for dismissal is to give the settlement agreement no real effect. Without a dismissal stipulation, the end result envisioned by the parties upon entering into the settlement agreement would never occur.

Courts effectively view a stipulation for dismissal as a settlement agreement; while the parties have the settlement agreement as the embodiment of their final agreement, courts view the stipulation for dismissal as the embodiment of the parties' settlement. Plaintiff's argument that a stipulation for dismissal is a modification of the settlement agreement is absurd. The court must give full enforcement to the Stipulation for Dismissal filed with this court since it embodies the parties' agreement that this case is fully settled.

D. The Parties Never Formed A Contract

Plaintiff argues that a contract was never formed between the parties, thus any purported settlement agreement initialed by Greenberg cannot be valid. In support of his argument plaintiff states that the proposed draft agreement was never signed by the defendants or their counsel before it was submitted to Greenberg for his approval. Also, plaintiff claims that the material provisions of the draft agreement did not conform to the provisions he sought and furthermore, he would never have agreed to the terms contained in the settlement agreement that defendants are now trying to enforce.

This court agrees with plaintiff's assertion that a settlement agreement is a contract between the parties and, as such, is

governed by contract principles such as offer, counteroffer and withdrawal of offers. Plaintiff's claim that offers and counteroffers were made by the parties to this suit during the settlement negotiation process is logical to this court. However, plaintiff's argument that the settlement agreement is not valid because he would never have agreed to its terms is irrelevant in light of the fact that this court previously determined that Greenberg had express and apparent authority to settle plaintiff's claims with the defendants. Plaintiff is once again claiming that he limited Greenberg's authority to settle his claims, an argument that this court does not find persuasive.

The court believes that Greenberg orally accepted the settlement offer on behalf of the plaintiff during the afternoon of September 17, 1991. Greenberg subsequently signed and dated a memorialization of the oral agreement later in the afternoon on that same September day. The failure of defendants personally, or of their agents, to sign the settlement agreement is inconsequential since a settlement was reached at the moment the representatives for the plaintiff and the defendants orally agreed to terms. The subsequent memorialization of that oral agreement did not change the fact that a settlement agreement had been reached by the parties. Thus, whether defendants or their agent signed the written memorialization before plaintiff's representative signed it is immaterial since nothing contained in the written memorialization of the oral settlement agreement could change the fact that an agreement had been made.

Greenberg's notation that the written memorialization met the discussion terms is further proof that the parties had reached a prior oral settlement agreement. Plaintiff's argument that a contract was never formed between the parties is unfounded - whether through offers or counteroffers by the parties, during the afternoon of September 17, 1991, one offer was orally accepted by plaintiff's agent which was later memorialized.

Upon reconsideration, this court has considered numerous arguments for and against the enforcement of the purported settlement agreement between the parties. The court is convinced that the settlement agreement was validly entered into by Greenberg, as agent for the plaintiff, and that he had both express and apparent authority to so act. Finding just reasons for enforcement, this court rules upon reconsideration that defendants' motion for enforcement is granted.

II. Court Ordered Sanctions

In an Order of March 27, 1992, this court alternatively held that dismissal of this case was appropriate because plaintiff failed to comply with the clear terms of the court's Order of August 6, 1991, which required that certain monetary sanctions be paid. In ordering reconsideration of this case, the court raised several issues for argument by counsel which involved the prior sanctions imposed on the plaintiff. In reviewing the submissions to the court on the reconsideration motion, it is evident that plaintiff has acted in a dilatory and obstructionist manner. For example, plaintiff was ordered to pay a $2,000 sanction by Judge Sommerville by November 25, 1990. Upon timely motion by the plaintiff, the court reconsidered its ruling and extended the due date for the sanctions to February 18, 1991. Defendants brought a motion to compel compliance or dismiss the case when the sanctions had not been paid by the end of March 1991. This court denied defendants' motion to dismiss and imposed the lesser sanction of an award of attorneys' fees and $1,000 in court costs, while also ordering plaintiff to pay the original $2,000 sanction. Order of August 6, 1991. Plaintiff finally paid the $2,000 sanction on August 16, 1991. The plaintiff also paid the $1,000 in court costs on September 16, 1991.

This court amended its Order on August 14, 1991, to clarify that the amount of attorneys' fees payable by plaintiff was $7,247.50. The Order expressly provided that the attorneys' fees were payable to the defendants within 60 days of the Order dated August 6, 1991, and that failure to comply would result in an invitation by the court to reconsider defendants' motion to dismiss the complaint with prejudice. Amended Order dated August 6, 1991. Defendants have never received payment of the attorneys' fees, however, the settlement agreement did forgive their payment.

Plaintiff has ardently asserted that the sanctions imposed upon him by the court were not required to be paid until he completed discovery in this case. This assertion is contrary to the plain language of the orders of the court. Each time sanctions were imposed against the plaintiff or the issue of sanctions was revisited, the court specified a date by which the sanctions were to be paid by the plaintiff. None of the court's orders gave plaintiff a reprieve from paying sanctions until his discovery was complete.

Based upon plaintiff's actions to date in this case, this court once again alternatively holds that if it had found Greenberg did not have express or apparent authority, this case would be dismissed for failure to comply with the clear terms of the court's Order of August 6, 1991.

III. Motions to Strike

Defendants' have made two separate motions to strike specific pleadings, namely plaintiff's Memorandum of Facts and Law (dated August 4, 1992) and the Affidavit of Daryl J. Bergmann (dated August 3, 1992). As this court does not find that the pleadings rise to the level required by Rule 12.06 for matter to be stricken, defendants' motions are both denied.

Rule 12.06 states in pertinent part:

"Upon motion made by a party...the court may order any pleading not in compliance with Rule 11 stricken as sham and false, or may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter."

Defendants' claim that the pleadings should be stricken for the redundant, immaterial, impertinent or scandalous matter contained therein.

Rule 12.06, as quoted above, is identical to Rule 12(f) of the Federal Rules of Civil Procedure. While there is little reported case law on Rule 12.06 in Minnesota, the application and use of Rule 12(f) in federal cases is unfortunately prevalent. This court is also mindful of the fact that it has considerable discretion in striking redundant, immaterial, impertinent or scandalous matter from court records. Alvarado-Morales v. Digital Equipment Corp., 843 F.2d 613, 618 (1st Cir. 1988) (citing Fed.R.Civ.P. 12(f)).

While both of the pleadings that defendants' have moved to strike contain material that is argumentative, derogatory and possibly unfounded, this court is loath to strike them because defendants have not been prejudiced in any way. Distrust and animosity have permeated this case from the start and plaintiff has made allegations in his pro se submissions of conspiracy and duplicity by numerous officers of the court. However, this court has not beenpersuaded by plaintiff's arguments and defendants have in no way been prejudiced before this court by those arguments. In light of the fact that defendants have not suffered prejudice by plaintiff's pleadings, this court denies both of defendants' motions to strike.

IV. Motions to Supplement the Record

Plaintiff has made two separate motions to supplement the record pursuant to Minn.R.App.P. 110.03, and defendants oppose both motions. The court considers both motions to be moot since plaintiff no longer currently has an appeal pertaining to this case pending. [However, due to the fact that plaintiff has already appealed orders from this case and therefore is likely to appeal this order, the court will decide the motions to supplement the record now and preclude the same motions at a later date.]

V. Conclusion

This court is convinced that plaintiff's attorney Greenberg had both express and apparent authority to enter into the settlement agreement defendants have moved to enforce. Alternatively, this court rules that plaintiff's failure to pay court ordered sanctions in a timely manner necessitated dismissal with prejudice of this action.

Both motions to strike certain pleadings by the plaintiff are denied by this court since defendants have not shown that the pleadings in question areprejudicial. Plaintiff's motions to supplement the record are denied on mootness grounds by this court.

OTHER OPINIONS IN THE CASE

STATE OF MINNESOTA
IN COURT OF APPEALS
C8-93-1526
Filed August 19, 1993

Daryl Bergmann, Appellant,

vs.

Lee Data Corporation, et al, Respondent, Sarah A. MacRae, Respondent.

ORDER

BASED UPON THE FILE, RECORD AND PROCEEDINGS HEREIN, AND BECAUSE:

1. This appeal was filed July 30, 1993.

2. By order on August 31, 1992, this court dismissed appellant's appeal from an April 16, 1992 judgment denying his motion to vacate, without prejudice to appellant's right to perfect a timely new appeal from the order or judgment resulting from the pending proceedings to reconsider.

3. In this appeal, appellant seeks review of the April 16 judgment and a May 3, 1993 judgment adjudicating the motion to reconsider.

This court's August 31, 1992 order in appeal C1-92-1292 dismissed with prejudice appellant's challenge to orders issued

prior to the October 1991 judgment of dismissal. However, appellant indicates in his statement ofthe case in this appeal that he intends to raise issues pertaining to pretrial discovery sanction orders. We will dismiss this part of the appeal, consistent with our August 31 order in appeal C1-92-1292.

5. Appellant failed to file the $250.00 filing fee for this appeal or an order from the trial court waiving the fee. See Minn.R.Civ.App.P. 103.01, subd. 3.

6. By notice of case filing dated July 30, 1993, the Clerk of the Appellate Courts, pursuant to this court's direction, noted the above deficiency and directed it be remedied within 10 days.

7. Appellant has not complied with this directive.

IT IS HEREBY ORDERED:

1. The part of the appeal from orders issued prior to the October 1991 judgment of dismissal is dismissed.
2. The balance of the appeal shall proceed pursuant to the rules of civil appellate procedure.
3. On or before August 30, 1993, appellant shall file either the $250.00 filing feeor a trial court order waiving the fee.
4. Failure to comply may result in the imposition of sanctions, including dismissal.

Dated: August 18, 1993

BY THE COURT
Paul H. Anderson
(Signed)
Chief Judge

STATE OF MINNESOTA
IN COURT OF APPEALS
C1-92-1292
Filed September 25, 1992

Daryl Bergmann, Appellant,

vs.

Lee Data Corporation, et al, Respondent, Sarah A. MacRae, Respondent.

ORDER

BASED UPON THE FILE, RECORD AND PROCEEDINGS HEREIN, AND BECAUSE:

1. On September 8, 1992, appellant filed a motion in this court to correct the record. No response to the motion has been filed.

2. Appellant's motion appears to be made in opposition to a pending motion in the trial court brought by respondents and served on August 19. Appellant did not provide a copy of respondents' motion and the nature of the relief respondents seek in the trial court is unclear.

3. Appellant should s ubmit his response to respondents' motion to the trial court, no t this court. Moreover, if appellant seeks to correct or modify the record on appeal, the motion must be submitted to and determined by the trial court. See Minn.R.Civ.App.P. 110.05.

IT IS HEREBY ORDERED:

1. Appellant's motion to correct the record is denied in its entirety.

2. Appellant's brief remains due 30 days after the transcript was delivered. See Minn.R.Civ.App.P. 131.01.

3. The Clerk of the Appellate Courts shall provide copies of this order to the Honorable Kevin S. Burke, counsel of record, and the trial court administrator.

Dated: September 24, 1992

BY THE COURT
Paul H. Anderson
(Signed)
Chief Judge

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUD. DIST.

MC 89-12254
Dated July 14, 1993

Daryl J. Bergmann, Plaintiff,

vs.

Lee Data Corporation, et al, Defendants.

AMENDED ORDER

The above entitled matter came on for hearing on January 14, 1992 before the undersigned Judge of District Court pursuant to plaintiff's motion to vacate dismissal pursuant to parties' agreement. In a letter dated May 26, 1992.

Plaintiff appeared pro se at the January 14th hearing. Roy Ginsburg, Esq. and Karen Maki, Esq. appeared on behalf of the defendants Lee Data Corporation (now known as Apertus Technologies), Robert Gordon, Gary White, Robert Besinger and Brian Kovalchuk. Jonathan Steinberg, Esq. appeared on behalf of the defendant Sarah MacRae. Alan C. Greenberg, Esq. attended the proceeding.

Based upon the files, records and proceedings held herein, the Court makes the following:

ORDER

1) Both parties are submit affidavits and memoranda of law concerning the following issues:

a) whether plaintiff paid Judge Sommerville's court ordered sanctions,

b) whether plaintiff paid the $1000 in court ordered sanctions,

c) whether plaintiff was required to pay sanctions until completion of his discovery,

d) the legal effect of the settlement agreement having a line requiring plaintiff's signature.

2) These affidavits and memoranda are to be submitted to the Court within 21 days of this Order. Upon submission, this Court will reconsider defendants' motion to enforce the settlement agreement.

DATED: July 14, 1992

BY THE COURT:
Kevin S. Burke
(Signed)
Judge of District Court

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUD. DIST.

MC 89-12254
Dated March 27 , 1992

Daryl J. Bergmann, Plaintiff,

vs.

Lee Data Corporation, et al, Defendants.

ORDER AND MEMORANDUM

The above entitled matter came on for hearing on January 14, 1992 before the undersigned Judge of District Court pursuant to plaintiff's motion to vacate dismissal pursuant to parties' agreement.

Plaintiff appeared pro se. Roy Ginsburg, Esq. and Karen Maki, Esq. appeared on behalf of the defendants.

Based upon the files, records and proceedings held herein, the Court makes the following:

ORDER

1) Plaintiff's motion to vacate the dismissal is denied.

2) The attached memorandum is incorporated herein by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY.
DATED: March 27, 1992

BY THE COURT:
Kevin S. Burke
(Signed)

MEMORANDUM
Bergmann v. Lee data Corporation
March 27, 1992

INTRODUCTION

The parties' dispute centers around the validity of a purported settlement agreement. Plaintiff's attorney and defendant's attorneys argue that they entered into a settlement agreement. Plaintiff claims that his attorney did not have authority to enter into this particular settlement agreement. Plaintiff brought this motion to vacate the dismissal based on the settlement agreement.

FACTS

This motion is the next stage in a lawsuit which was already long and protracted when it case before this Court in 1991 on defendants' motion to dismiss the complaint with prejudice pursuant to Minn.R.Civ.P. 37.02(b)(3) and 41.02(a). The motion was based on plaintiff's failure to comply with a court order to pay attorney's fees and plaintiff's general unreasonable vexatious conduct and obstructionist tactics. Although this Court did not grant the motion, it did impose significant sanctions. In so doing, this Court observed that "there is no legitimate reason advanced by the plaintiff for failure to comply with [the Court's] order. At best, plaintiff's position is that he and his attorney have acted in reckless disregard of the clear and unmistakable terms of a simple order. At worst, plaintiff and his attorney have intentionally and without any justification violated a court order." Memorandum of Aug. 6, 1991 at 3-4. This court concluded that:

"Even though the defendants may not have suffered the sort of harm or prejudice which would justify outright dismissal,

during the course of this litigation, the plaintiff has abused the limited amount of time this court has to resolve disputes. This abuse was clearly wilful and is made more offensive in that plaintiff is an attorney himself and has no basis for claiming ignorance. It is not incumbent on this Court to sit idly by and thereby subsidize and encourage and sanction conduct which unjustifiably and excessively depletes a scarce resource--this Court's time. This conduct justifies requiring the plaintiff to pay all of defendant's attorney's fee and a fine for abusing the court's time."

Id. at 24-25 (emphasis in original).

After the issuance of the Order imposing sanctions, on September 26 and 27, 1991, defendants' counsel, Roy Ginsburg and Karen Maki, took the depositions of Diana Hanson, a former employer and client of plaintiff, and Mindy Mitnick, a psychologist and consultant previously retained by plaintiff. Plaintiff claims that these depositions contain manufactured testimony, false and slanderous comments and were manipulated to fraudulently bolster each other.

Following there depositions, plaintiff claims that defendants threatened him with new and unspecified court sanctions. Plaintiff, who is now acting pro se, also claims that his attorney showed him a counterclaim for the first time and told him that it would be burdensome to go forward with the case since Hanson's and Mitnick's testimony "dovetailed". Finally, plaintiff claims that his attorney asked him to hurry and make up his mind about a dismissal, since his attorney said he intended to leave on vacation that evening.

Plaintiff's version of the circumstances surrounding the signing of the agreement to dismiss the case is as follows:

"Under advice of counsel, plaintiff then agreed to allow counsel to ask defendants about the terms of a settlement

subject to a mutual release. Plaintiff's counsel called plaintiff at home later that afternoon to convey the terms of the settlement agreement. Defendants required plaintiff to give up and transfer his stock in Lee Data (Apertus Technologies, Inc.) and agree not to repurchase any stock for a period of at least five years. Plaintiff agreed to consider the terms and returned a call to his counsel about thirty minutes later. Plaintiff then asked counsel to negotiate a price for the stock and to obtain defendants' absolute assurances of confidentiality with respect to plaintiff's medical records and the testimony of Mitnick, which was noted as being subject to the existing Protective Order in the case. Plaintiff's counsel then contacted defendants, and returned their answer to the plaintiff that they would agree to confidentiality but would not agree to pay for the stock. Plaintiff then instructed his counsel that he would not allow any document to be signed without first being able to read it. Counsel said he would sign a letter of intent that could be reviewed and revised upon his return from vacation October 14, 1991."

Plaintiff's Memorandum of Law at 2 (emphasis added).

Plaintiff claims that he later learned that his attorney had signed an unconditional dismissal in the case and a draft release was presented which contained a unilateral release and a release of defendants' attorneys. Plaintiff asserts that he immediately objected to his attorney in person upon his attorney's return from vacation and confirmed his objection in a letter which was hand delivered that same day with a copy sent by mail.

This Court's Order of August 6, 1991 provided, in lieu of granting the motion to dismiss, that plaintiff pay the original $2,000 in attorney's fees as previously ordered within 10 days of the order, that plaintiff pay all of defendants' attorney's fees as a result of bringing the motion within 60 days of the order and that plaintiff pay $1000 in court costs payable

within 30 days of the order as a sanction for obstructionist litigation tactics. Neither party disputes that plaintiff has not met any of these conditions.

ISSUES

1. Whether the parties' agreement was based on coercion, fraud or collusion?

2. Whether Bergmann's attorney had authority to enter into the agreement?

3. Whether the Court as an alternative holding should dismiss this action for failure to comply with sanctions previously imposed?

ANALYSIS

This Court must decide whether or not to set aside the parties' agreement to dismiss the case. In making this decision, this Court is mindful of the Minnesota Supreme Court's admonition that settling suits without trial is greatly favored and that Minnesota courts should not set aside such agreements lightly. Johnson v. St.Paul Insurance Co., 305 N.W.2d 571, 573 (Minn. 1981).

I. Fraud

Plaintiff claims that the dismissal and proposed settlement agreement must be set aside and vacated for fraud. He asserts that "defendants' deposition and discovery tactics amounted to a fraud on the Court and against plaintiff because of the material false and oppressive testimony. That testimony and defendants' threats of sanctions and attorney fees in connection with their proposed motion to dismiss amounted to an illegal coercion in violation of Minn.Stat. Sec. 609.27..." Plaintiff's Memorandum of Law at 3.

Plaintiff further asserts that defendants caused him to forbear his lawful right to proceed with the lawsuit by threatening to ruin him in his profession by exposing false and defaming perjured testimony against him. Id.

This Court is not persuaded by plaintiff's arguments. His claim basically amounts to saying that defendants threatened him with presenting evidence at trial which would be unfavorable to him, and that this was wrong. There is nothing impermissible or fraudulent in this. In fact, claiming that one's evidence is damaging to the opposing party is the very essence of pretrial negotiation and settlement tactics. If courts were to set aside settlements on this ground, no settlement agreement would ever be enforceable against any party. It certainly would have been within plaintiff's power to contradict or impeach defendant's testimony and evidence at trial rather than entering into a settlement agreement. Plaintiff cannot blame defendant for his failure to avail himself of this opportunity.

II. Authority to Settle

Mr. Bermann's attorney argues that his client had authorized him to settle the case Mr. Bergmann asserts that he told his attorney not to approve any settlement without consulting him. This Court must determine whether Mr. Bergmann's attorney had authority to enter into this agreement.

An attorney compromising a claim must have authority in order to bind their clients. Schumann v. Northtown Ins. Agency, Inc., 452 N.W.2d 482 (Minn.Ct.App. 1990). If an attorney enters into an agreement without his client's authorization, Minn.Stat. Sec. 481.09 provides in relevant part that:

"At any stage of the proceedings the court may relieve a party from the consequences of the unauthorized acts of an

attorney and, upon motion, may summarily compel such attorney to repair any injury resulting therefrom." (emphasis added).

The general rule is that an attorney does not have authority to settle without his client's knowledge or consent. Schumann v. Northtown Ins Agency, Inc., 452 N.W. 2d 482, 484 (Minn.Ct.App. 1990). Authority to settle can be express or implied.

Express Authority

Whether a client has given his attorney express authority to settle a claim is normally a question of fact to be resolved by the trial court. Austin Farm Center v. Austin Grain Co., 418 N.W.2d 181, 184 (Minn.Ct.App. 1988). In this case, however, the issue is a more narrow one. It is clear that Mr. Bergmann's attorney had some sort of settlement authority. The issue is whether Mr. Bergmann's claim that at some point relatively late in the proceedings Mr. Bergmann explicitly told his attorney not to approve any settlement offer without consulting him.

Although it is not necessary for this court to resolve this issue since it finds that Mr. Bergmann's attorney's agreement to settle is binding because he was acting within his apparent authority, it finds Mr. Bergmann's attorney's testimony more credible than that of Mr. Bergmann. As previously noted, Mr. Bergmann has exhibited a pattern of dilatory and obstructionist tactics during the course of this litigation. This has not only manifested itself in his behavior toward the opposing party, but also toward the Court in refusing to obey a court order.

Implied Authority

Even if Bergmann's attorney did not have express authority to settle this case, the settlement could be binding under one or more of three other theories: estoppel, ratification and implied/apparent authority.

Estoppel

Estoppel is an equitable doctrine addressed to the discretion of the trial court. Johnson v. Sitzman, 413 N.W.2d 541, 545 (Minn.Ct.App. 1987) (citation omitted). In order for equitable estoppel to apply, a party must demonstrate inducement through language or conduct to rely in good faith on the language or conduct resulting in injury, detriment, or prejudice. Id. (citation omitted). This court would not hesitate to find that a reasonable person could be induced to rely based on Bergmann's conduct. In this case, however, this court can find no injury, detriment or prejudice to Lee Data apart from the mere extension of already protracted proceedings. The parties are simply back where they were before the alleged settlement agreement was signed--they are no better or worse off.

Ratification

A client can be bound if he either expressly or impliedly ratifies the agreement. Skalbeck v. Agristor Leasing, 384 N.W.2d 209, 213 (Minn.Ct.App. 1986) (citation omitted). Both conduct and verbal expression can constitute acceptance. Id. (citation omitted). Silence can be acceptance where there is a duty to otherwise deny. Id.

In Skalbeck, a written agreement was sent to buyer's of a silage loader with respect to a settlement of a breach of warranty action against the seller and manufacturer. Id. The buyers did not dispute the terms of the settlement agreement

for six months and the buyers failed to affirmatively contact their attorney to dispute the settlement of the breach of warranty claim against the seller. Id. The trial court made express findings of fact so the issue before the Court of Appeals was whether there was "any reasonable basis in the record" for the trial court's decision. Id. at 212. The Skalbeck court determined that the trial court could have reasonably found that the six months' delay and the buyers' failure to affirmatively contact their attorney regarding the settlement amount to an implied acceptance of the settlement. Id. at 214. See also Schumann v. Northtown Ins. Agency, 452 N.W.2d 482 (Minn.Ct.App. 1990) (attorney's written acceptance of settlement offer was binding on clients who, after receiving a copy of the written acceptance, failed to repudiated authorization until three months later); Austin Farm Center v. Asutin Grain Co., 418 N.W.2d 181 (Minn.Ct.App. 1988) (creditor impliedly accepted or ratified oral settlement offer presented by debtor's attorney to creditor's attorney where creditor's attorney kept the settlement check for three months and cashed it before responding to the offer, creditor's attorney then wrote letter indicating that he had not yet received permission to sign stipulation of dismissal, but failing to indicate that creditor refused to sign stipulation, and only communication from creditor from debtors after response letter was notice of substitution of counsel.); Rosenberg v. Townsend, Rosenberg & Young, 376 N.W.2d 434 (Minn.Ct.App. 1985) (Where Rosenberg retained the settlement check for eighteen months without notifying the corporation that it would not be accepted as payment in full, court could have properly concluded that Rosenberg had impliedly accepted the offer of settlement).

The facts of this case do not allow this Court to find that Mr. Bergmann ratified the purported settlement agreement either through conduct or verbal expression. He brought this motion soon after the agreement was signed by his attorney.

He would had to have kept silent for a significantly longer period in order for cases like Skalbeck and Schumann to be controlling here. By bringing this motion, Mr. Bergmann obviously has affirmatively contacted his attorney regarding the settlement and has not remained silent.

Apparent Authority

Lee Data contends that Mr. Bergmann's attorney had apparent authority to settle for him. It is true that the rules and principles of the law of agency control the relation of attorney and client. Schumann, 452 N.W.2d 484.

Lee Data argues that Bergstrom v. Sears, Roebuck & Co., 532 F.Supp. 923 (D.Minn. 1982), should be controlling in this case. In Bergstrom, one of the issues was whether the party's attorney, who was authorized by defendant's president and board chairperson and owner of 96% of the shares of the corporation to settle the lawsuit, had the authority to bind the defendant to a settlement agreement.

The court noted that the doctrine of apparent authority applies when:

"A principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in assuming that such agent has authority to perform a particular act and deals with the agent upon that assumption, the principal is estopped as against such third person from denying the agent's authority; he will not be permitted to prove that the agent's authority was, in fact, less extensive that that with which he was apparently clothed. This rule has been based upon the principle that where one of two innocent parties must suffer from the wrongful act of another, the loss should fall upon the one who, by his conduct, created the

circumstances which enabled the third party to perpetrate the wrong and cause the loss.

Id. (quoting 3 Am.Jur. 2d Agency S. 76 (1962)).

In Bergstrom, the court found the following actions gave rise to apparent authority:

1) the attorney was retained for the specific purpose of pursuing a settlement of the lawsuit,

2) opposing counsel inquired of the principal regarding the attorney's status and principal's representative confirmed that the attorney had been retained,

3) although in the initial discussions, the attorney's authority was expressly limited to negotiating, he later approached opposing counsel with a new offer of a different package than had been negotiated earlier and he acted in the same manner as any other attorney with authority to settle a lawsuit,

4) Principal's representatives at no time did anything to indicate to the opposing party that attorney had less than full authority to settle, despite the fact that they were in frequent contact with the opposing party during that time period,

5) When principal's house counsel received the drafts of the settlement letter, he failed to disavow the agreement, and

6) At no time did anyone from principal's company take the step of informing the opposing party that attorney's authority had been terminated. Id. at 933.

Bergstrom was a case in federal court, and has not yet been cited by any Minnesota state appellate court. This court, however, finds the reasoning persuasive. Minnesota state appellate courts have recognized the doctrine of apparent authority. See, e.g., Hornblower & Weeks-Hemphill Noyes v. Lazere, 222 N.W.2d 799 (Minn. 1974) (employee had apparent authority to receive defendant's request for return of his stock because all of defendant's business with plaintiff was conducted through a stockbroker-employee of plaintiff and defendant was not advised that the employee was unable to handle his request for the return of the stock.). as noted above, Minnesota courts also recognize that the law of agency applies tothe attorney-client relationship.

The facts of this case fall within the Bergstrom court's definition of apparent authority: Bergmann's attorney, as his agent, was placed by Bergmann in the position of negotiating a settlement agreement and defendants' counsel was justified in assuming he had such authority (based on settlement negotiations) and dealt with him on that assumption (by entering into the agreement).

Like in Bergstrom, in this case there were circumstances giving rise to attorney's authority, an intervening act which could have divested the attorney of authority (in Bergstrom, the termination of authority, in this case, Mr. Bergmann's alleged statement to his attorney that he would have to approve of all the terms of any settlement agreement) as well as a failure to alert opposing counsel. Given the failure to notify the opposing party, the opposing party reasonably assumed Mr. Bergmann's attorney had authority to enter into the settlement agreement. Therefore, Mr. Bergmann is now estopped from denying such authority.

III. Failure to Comply with Sanctions

Pursuant to the Court's Order of August 6, 1991, plaintiff was ordered to do the following in order to prevent the dismissal of his claim:

1) Plaintiff shall within 10 days of this order pay the original $2,000 in attorney's fees to the defendants ordered by Judge Sommerville in his order dated January 28, 1991.
2) Plaintiff shall pay all of defendant's attorney fees incurred as a result of bringing this motion. These attorney's fees shall be paid within 60 days of this order.
3) the court hereby imposes a $1000 court cost payable to the District Court within 30 days of this order as a sanction for obstructionist litigation tactics.
4) the failure to comply with any provision of this order will result in an invitation by the court to reconsider defendants' motion to dismiss with prejudice.

Order of August 6, 1991 at 1.

Plaintiff has not complied with the terms of this Order. If the Court would have been unable to find either of the two independent grounds for its decision above, i.e. that it found Mr. Bergmann's attorney's testimony regarding express authority more credible and that it found that Mr. Bergmann had apparent authority to settle the suit, this Court would have dismissed the case for failure to comply with the clear terms of the Order.

REFERENCED STATUTES, RULES AND PROVISIONS PURSUANT TO USSC RULE 14.1(f)

REFERENCED RULES OF THE MINNESOTA RULES OF CIVIL PROCEDURE:

Rule 6.04 For Motions; Affidavits

A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served no later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. A motion may be supported by papers on file by reference; supporting papers not on file shall be served with the motion; and, except as otherwise provided in Rule 59.04, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

Rule 7.02 Motions And Other Papers

(a) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of a writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. Motions provided in these rules are motions requiring a written notice to the party and a hearing before the order can be issued unless the particular rule under which the motion is made specifically provides that the motion may be made ex parte. The parties may agree to written submission to the court for decision without oral argument unless the court directs otherwise. Upon the request of a party or upon its own initiative, the court may hear any motion by telephone conference.

(b) The rules applicable for captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) All motions will be signed in accordance with Rule 11.

Rule 11 Signing Of Pleadings, Motions And Other Papers; Sanctions

Every pleading, motion and other paper of a party represented by an attorney shall be personally signed by at least one attorney of record in the attorney's individual name and shall state the attorney's address, telephone number, and attorney registration number. A party who is not represented by an attorney shall personally sign the pleading, motion or other paper and state the pleader's address and telephone number. Except when otherwise specifically provided by rule or statute, pleadings need not be verified by affidavit or accompanied by affidavit. The signature of an attorney or party constitutes a certification that the pleading, motion or other paper has been read; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it tis not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable

expenses incurred because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

Rule 12.06 Motion To Strike

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party, or upon its own initiative at any time, the court may order any pleading not in compliance with Rule 11 stricken as sham and false, or may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

Rule 41.02 Involuntary Dismissal

(1) The court may on its own motion, or upon motion of a party, and upon such notice as it may prescribe, dismiss an action or claim for failure to prosecute or to comply with these rules or any order of the court.

(2) After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52.01. (Emphasis added.)

(3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this rule and any dismissal not provided for in this rule or in Rule 41.01, other than a

dismissal for lack of jurisdiction, for forum non conveniens, or for failure to join a party indispensable under Rule 19, operates as an adjudication upon the merits.

Rule 52.01 Findings By Court; Effect

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts speciallly and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds for its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a referee, to the extent adopted by the court, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court or in an accompanying memorandum. Findings of fact and conclusions of lax are unnecessary on decisions on motion pursuant to Rules 12 or 56 or any other motion except as provided in Rule 41.02

Rule 63.02 Interest Or Bias

No judge shall sit in any case if that judge is interested in its determination or if that judge might be excluded for bias from acting therein as a juror. If there is no other judge of the district who is qualified, or if there is only one judge of the district, such judge shall forthwith notify the chief justice of the supreme court of that judge's disqualification.

REFERENCED RULES OF MINNESOTA GENERAL RULES OF PRACTICE FOR DISTRICT COURTS

Rule 115.02 Obtaining Hearing Date; Notice To Parties

A hearing date and time shall be obtained from the court administrator or a designated motion calendar deputy. A party obtaining a date and time for a hearing on a motion or for any other calendar setting, shall promptly give notice advising all other parties who have appeared in the action so that cross motions may, insofar as possible, be heard on a single hearing date.

Rule 116 Orders To Show Cause

An order to show cause will be issued only in a case where a statute or rule of civil procedure provides that such an order may be issued or where the court deems it necessary to require the party to appear in person at the hearing.

REFERENCED RULES OF THE MINNESOTA RULES OF CIVIL APPELLATE PROCEDURE

Rule 103.03 Appealable Judgments And Orders

An appeal may be taken to the Court Of Appeals:

(a) from a judgment entered in the trial court;

***

Rule 104.01 Time For Filing And Service

An appeal may be taken from a judgment within 90 days after its entry, and from an order within 30 days after service by the

adverse party of written notice of filing unless a different time is provided by law.

***

Rule 108.03 Extent Of Stay

When a bond is filed as provided by Rule 108.01, it shall stay all further proceedings in the trial court upon the judgment or order appealed from or the matter embraced in it; but the trial court may proceed upon any other matter included in the action and not affected by the judgment or order from which the appeal is taken.

Rule 110.05 Correction Or Modification Of The Record

If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and determined by the trial court and the record made to conform. If anything material to either party is omitted from the record by error or accident or is misstated in it, the parties by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, or the appellate court, on motion by a party or on its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be approved and transmitted. All other questions as to the form and content of the record shall be presented to the appellate court.

Rule 128.02 Formal Brief

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(c) A statement of the case and the facts.The facts must be stated fairly, with complete candor, and as concisely as possible...Each statement of a material fact shall be

accompanied by a reference to the record, as provided in Rule 128.03.

***

Rule 128.03 References In Briefs To Record

Whenever a reference is made in the briefs to any part of the record which is reproduced in the appendix or in a supplemental record, the reference shall be made to the specific pages of the appendix or the supplemental record where the particular part of the record is reproduced. Whenever a reference is made to a part of the record which is not reproduced in the appendix or in a supplemental record, the reference shall be made to the particular part of the record, suitably designated, and to the specific pages of it, e.g., Motion for Summary Judgment, p. 1; Transcript, p. 135; Plaintiff's Exhibit D, p. 3. Intelligible abbreviations may be used.

Rule 140.01 Petition For Rehearing

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No petition for reconsideration or rehearing of a denial of a petition for review provided by Rule 117, or of a petition for accelerated review provided by Rule 118, shall be allowed in the Supreme Court.

REFERENCED MINNESOTA STATUTES SECTIONS

Minn.Stat., Sec. 336.8-319
Statute Of Frauds [Sale of Securities]

A contract for the sale of securities is not enforceable by way of action or defense unless:

(a) there is some writing signed by the party against whom enforcement is sought or by the party's authorized agent or broker, sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined price;

***

(c) within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under paragraph (a) has been received by the party against whom enforcement is sought and the recipient has failed to send written objection to its contents within ten days after its receipt;

***

Minn.Stat., Sec. 481.08
Authority

An attorney may bind a client, at any stage of an action or proceeding, by agreement made in open court or in the presence of the court administrator, and entered in the minutes by such court administrator, or made in writing and signed by such attorney. During any proceeding or action the attorney may receive money claimed therein by a client, and within six years after judgment, upon payment thereof, may discharge the claim or acknowledge satisfaction of the judgment; but all such authority shall cease upon the substitution of another attorney.

Minn.Stat., Sec. 513.01
Statute Of Frauds

No action shall be maintained, in either of the following cases, upon any agreement, unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party charged therewith:

(1) Every agreement that by its terms is not to be performed within one year from the making thereof;

***

Minn.Stat., Sec. 588.04
Arrest; Order To Show Cause

In cases of constructive contempt, an affidavit of the facts constituting the contempt shall be presented to the court or officer, who may either issue a warrant of arrest to bring the person charged to answer or, without a previous arrest, upon notice, or upon an order to show cause, which may be served by a sheriff or other officer in the same manner as a summons in an action, may commit the person to jail, impose a fine, or both, and make such order thereupon as the case may require.

EXCERPTS OF MEMORANDA, AFFIDAVITS AND MOTIONS PURSUANT TO USSC RULE 14.1(h)

PETITIONER'S MEMORANDUM IN SUPPORT OF MOTION FOR ORAL ARGUMENT OCTOBER 29, 1993

[PAGES 3 TO 5]

Both the Appellant's expense of the litigation, and the black balling tactics of the Respondents is shown by their own Brief. The Respondents' (Lee Data) Brief refers to Appellant's expense at page 3, lines 16 to 17, stating, "A litigation campaign of this kind would be prohibitively expensive for all but a few extraordinarily wealthy individuals". Appellant, however, is not wealthy, and has suffered an enormous toll due to the Respondents' continuing prejudicial rule and ethical violations in this litigation. Respondents' black balling tactics are clear from their Brief and the supporting analysis of Appellant's Motion To Strike Respondents' (Lee Data's) Brief served October 25, 1993, and filed with the Court on October 26, 1993. The Respondents' Brief follows a pattern of willful disregard for court rules and court orders in the Trial Court. (See a partial discussion and documentation of such conduct at A-141 to A-361, Vol. II; A-363 to A-394, Vol. III; and Apls.Mot.Strk. dated October 25, 1993.)

The cost of litigating against such tactics is obvious to Respondents, according to their own brief, and should be clear to the Court. The Respondents argue that Appellant has only been able to continue this costly litigation because he is an

attorney, giving him an unfair advantage over Dorsey & Whitney and Lee Data, a public company with a net worth of at least $15,000,000, (see Page .Brf. p. 3, l. 18 to p. 4, l. 1.)

The toll on Appellant has included a substantial financial outlay. The Appellant has been required to retain three different attorneys in this matter at significant expense for a duplication of effort. The Respondents have pointed out Appellant's cost for such duplication of effort in nearly every memorandum, and at every hearing they have attended since the beginning of the present case, (ie: see Rsps.Brf. p. 8, l. 13 to p. 9). The Respondents' have made that argument to prejudice Appellant's case, implying the attorneys quit for lack of confidence. There is no evidence on the record to support that suggestion. However, in response, the Appellant has been forced to document the nature of those privileged attorney -client relationships. Appellant's counsel, Mr. Lentz, withdrew because of a conflict of interest that arose between his law firm and Lee Data. Mr. Albright's services on my behalf were suspended, but he was fired by his own law firm, not by me. (See discussion at A-181, l. 12 to A-182, l. 10; esp. A-181 ls. 24-25.) Each change of counsel required payment of a fee or a retainer, and the expense of a duplication of effort for each to become familiar with the case.

The fact that Appellant is an attorney and able to represent himself pro se, is not a financial advantage. All of Appellant's effort in this litigation have taken away from his time and ability to earn a living. The Respondents' black balling tactics have required Appellant to spend considerable time and effort defending unsupported accusation, hearsay, and unscrupulous conduct by Respondents' counsel in violation of the rules of professional responsibility, court orders and rules of civil procedure. Dorsey & Whitney uses such litigation strategy knowing that individuals are driven to financial hardship defending against their unscrupulous conduct.

[*PAGE 15 TO 17*]

(2) If Respondents' Brief does violate MRCAP, Rule 128.02, whether such violations are prejudicial to the Appellant so as to require corrective action by the Court?

Matter that is not part of the record should not be printed in briefs of counsel or comment made thereon, Sargent v. Bryan, 1926, 166 Minn. 45, 207 N.W. 178. Respondents' use of inadmissible material misrepresentation, and other violations of the rules is so intertwined with their argument that it cannot be stricken without rewriting their entire brief. There are more than 60 sections of the "Argument" of Respondents' Brief that discuss or incorporate inadmissible references, (see refs. at page 3, prg. 3, to page 4, above). The violations are extensivelyprejudicial to Appellant, and are an example of Respondents' tactics in the Trial Court as well, (see RA 58-78; A-283; A-141 to A-203).

The rules of civil and appellate procedure are in place for a reason. Respondents' have severely prejudiced Appellant by clearly violating those rules throughout this case. Appellant should not be required to prove how each violation has been prejudicial to his case. In sum, it is the cumulative effect of all inappropriate references and rule violations that have prejudiced the courts decisions.

The hyperbole, misrepresentation and other rule violations by Respondents' have biased both the Trial Court and this Court. An example of such bias is Chief Judge Anderson's dismissal of Appellate Court Case No: C1-92-1292. In determining Appellant's motion filed September 8, 1992 criticizing similar conduct by Respondents' in connection with

that appeal, Chief Judge Anderson did not review the file or even the Court's prior order in the case, (compare the Court's Orders filed September 25, 1992 and October 9, 1992 with the Court's Order filed September 1, 1992). Dorsey & Whitney's attorney then notified the Court's staff counsel to correct Judge Anderson's error on the record. Without notifying Appellant, or reviewing the Appellant's motion, Judge Anderson issued a corrective order filed October 21, 1992 and an apology letter dated October 19, 1992. It was clear from the September 25 and October 9 orders that Judge Anderson had not reviewed the file in determining Appellant's motion filed September 8, 1992. The corrective action taken was based on indirect ex parte communications by Respondents' counsel. From the record it appears as though Judge Anderson did not consider Appellant's motion upon an informed review of the file. This example proves on the record that the courts are influenced by the wrongful conduct and rule violations of Dorsey & Whitney.

Since the Respondents' Brief cannot be edited to strike wrongfully submitted material, the prejudice to Appellant's case can only be avoided by striking Respondents' entire brief.

CONCLUSION

Respondents' Brief contains innumerable references to documents and assertions not on the record. The decisions of the Trial Court have not been based on admissible evidence, but have been largely influenced by the hearsay affidavit testimony of Respondents' attorneys as well as by their similar conduct in violation of the rules.

There is so much inadmissible material in Respondents' Brief that it is clear their rule violations were intentional. The prejudicial violations of Respondents' Brief cannot be corrected in any way other than by striking the Brief in

its entirety andsanctioning Respondents for Appellant's costs in preparing and filing this motion.

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE DATED NOVEMBER 4, 1993

[*PAGES 8 TO 10*]

In connection with Respondents alleged statement by Judge Burke that the litigation would have been dismissed due to "Appellant's irrefutable failure to pay the sanctions the court assessed against him", is not an accurate quote, (see A-19, ls. 10-12). Judge Burke did not find the failure "irrefutable". Appellant notes that rsp black-balling tactics influenced the sanctions which were not justified; Appellant was not given timely notice of the Trial Court's orders to pay sanctions; Appellant's attorney, whose motives are questionable, was responsible to notify the apl so that timely payments could be made; Appellant's attorney willfully failed to make payments that appellant did direct him to make; Appellant was not given a hearing regarding his own actions and the Trial Court assumed he had knowledge and was responsible because Appellant is an attorney himself, (an attorney has the right to hire another attorney to take up his cause, and an attorney does not have a lesser responsibility to a client simply because the client is also an attorney, and as Respondents argue, Mr.Greenberg had control of the litigation at that time); Respondents had not allowed Appellant to complete his discovery and the Respondents agreed to defer Appellant's obligation to pay sanctions until after the completion of discovery, (see Rspdts. .Ginsburg Ltr. dated September 3, 1991, C1-92-1292, A-76. Please read that letter in combination with A-74, which makes that meaning absolutely clear, giving Appellant every right to rely on Mr. Ginsburg's representation and the right to relief on the grounds of promissory estopel.); Appellant did make every possible effort to pay sanctions on time, he paid his attorney and believed in good faith that sanctions were being

paid when due because of the documented deferals agreed to in writing by the Respondents attorney, Mr. Ginsburg, (see C1-92-1292, A-36 to A-38, l. 4; and A-55 to A-57, l. 2); the Respondents refused Appellant's offer to set the dismissal aside and accept payment of sanctions; and the Trial Court found on its own volition that an oral contract was formed on terms putting the agreement within the Statute of Frauds and therefore such sanctions are not enforceable against Appellant.

All of the above arguments apply to the remainder of Respondents' opposing memorandum, and there is ample case law to support Appellant's position.

The appeal court is limited to consideration of matters appearing on the record, and additional materials are stricken on motion, (Chizmadia v. Smilev's Point Clinic, 428 N.W.2d 459,(Minn.Ct.App. 1988); Safeco Ins. Co. v. Diaz, 385 N.W.2d 845, (Minn.Ct.App. 1986). In Merle's Constr.Co. v. Berg, 442 N.W.2d 472, (Minn.Ct.App. 1989), a trial judge's later affidavit was stricken on the court's own motion.

PETITIONER'S REPLY BRIEF
DATED OCTOBER 12, 1993

[*PAGES 5 TO 18*]

A. Whether The Trial Court Correctly Ruled That The Settlement Agreement Is Enforceable As A Matter Of Law.

1. Whether Appellant Waived His Right To Raise The Statute Of Frauds.

Respondents argue at page 27 that new issues may not be raised for the first time on appeal. This case is distinguishable from Respondents' case cites on several points.

There are many exceptions to the rule relied on by Respondents. First, an Appellate Court may base its decision on a theory not presented to or considered by the Trial Court where the question raised for the first time on appeal is plainly decisive of the matter appealed, on its merits, where the facts are undisputed, and where there is no possible advantage or disadvantage to either party in not having had a prior ruling by the Trial Court on the question. (Holen v. Mpls. St. Paul Metro. Arprts. Comms., 250 Minn. 130, 84 N.W.2d 282, (1957); Christianson v. Hager, 242 Minn. 41, 64 N.W.2d 35, (1954); Chicago M. & St. P. Ry. v. Sprague, 140 Minn. 1, 167 N.W. 124, (1918), Dunnell's Minn. Dig., 4th Ed., Vol. 2, p. 342, Sec. 5.02.) In this case, application of the Statute of Frauds is plainly decisive of the matter appealed, on its merits, and the facts putting the alleged Settlement Agreement within the Statute of Frauds are undisputed. Respondents have not identified any prejudice through application of the Statute of Frauds by the Court on this appeal. They have not indicated any additional facts that would have been raised to defeat the Statute of Frauds in the Trial Court. (Holen, Id.) The rule that an issue be determined first by the Trial Court is not applied where it

conclusively appears, as here, that the point urged by the Respondents could not have been urged, or avoided by other evidence, (Bauman v. Metzger, 145 Minn. 133, 176 N.W. 497, (1920).

The Appellate Court has a duty to, and on its own motion may, consider and determine a case on the ground of "illegality", although such ground was not presented to or considered by the Trial Court, if such illegality is apparent on undisputed facts and is in clear contravention of public policy, and if a decision thereon will be decisive of the controversy appealed, on its merits, (Atwood v. Holmes, 229 Minn. 37, 38 N.W.2d 62, (1949); Hart v. Bell, 222 Minn 69, 23 N.W.2d 375, 24 N.W.2d 41):

"An issue of illegality not presented to the Trial Court, though it involves a mere error of law, may be considered for the first time on appeal if it involves a controlling legal principle or statute which, with respect to undisputed facts, the courts are judicially bound to know." (Atwood, Id., p. 66.)"

Mill Pond Towers, Id., does not apply to the present case because it did not involve any allegation of a controlling statute or illegality. In that case the appellant offered a new set of evidence not on the record and a new legal theory. In Northwestern Natl. Bk., Id., the appellant raised new evidential questions on appeal, after a trial.

When a trial court ignores or overlooks a legal theory, it may be considered for the first time on appeal where the trial court was fully informed of undisputed facts on the record. See Hart, Id., p. 65-66:

"It is an elementary and basic requirement of all just procedure that before a litigant, in the interest of the public welfare, is deprived of rights he claims to exist, caution

should be exercised to insure that he has not been, and will not be, thereby denied an opportunity to present his case with respect to illegality." (Hart, Id., 23 N.W.2d 375, 379.)"

In this case there has not yet been a trial, Appellant has properly and timely asserted his claims of illegality, statutory limitations, and misconduct. Undisputed facts and the findings of the Trial Court put the settlement document squarely within the Statute of Frauds. Failure to apply the Statute of Frauds is a clear contravention of public policy, and application of the statute is conclusively determinative of the matter appealed, on its merits. The Appellate Court has a duty to review the facts and apply the Statute of Frauds in this case. Respondents' cases do not change the analysis.

Here, no pleadings were required as to the Statute of Frauds. Even if pleadings had been required on the issue, under Minnesota decisions, and the weight of authority, it is clear that the Statute of Frauds need not be pleaded specially. It may be raised by a general denial, (Bruder v. Wolpert, 178 Minn. 330, 227 N.W. 46, 49 Am.Jur, Stat.Frauds, Sec. 603, Annotation, 158 A.L.R. 113; Borchardt v. Kulick, 48 N.W.2d 318, (1951)). Appellant immediately and consistently denied the formation of any contract whatsoever as soon as he learned of Respondents' intent to claim that a written settlement agreement had been formed. Appellant's November 27, 1991 letter to Judge Burke was certainly sufficient to meet the requirement of a general denial. Altomare and Laserage Technology Corp., cited by Respondents at page 27, lines 19-24, of their brief do not apply as they are pulled from foreign jurisdictions on issues settled in Minnesota and in our federal circuit. Those cases have to do with a party's responsive pleadings asserting the Statute of Frauds.

A more significant flaw in Respondents' argument is that, based on the allegations and arguments of Respondents,

Appellant was not required to raise the Statute of Frauds in the Trial Court. Respondents argued consistently that there was only a written contract. The Respondents' never argued that an oral contract had been formed. Respondents have always argued that the oral evidence they submitted was only shown to describe the circumstances under which a written agreement was executed by Mr. Greenberg, (see Rsp.Brf., p. 33, l. 10-15). The Appellant denied the existence of any contract and objected to evidential submissions of an agreement, (see Plts.Sh.C.Ord., A-363, with attached Mot.Strk.; and Plts.Resps.Defs.Mot.Strk, A-141). The importance of these facts procedurally is that the Statute of Frauds did not become an issue in the Trial Court, and could not have become an issue until the assertion of an oral contract. The Trial Court had before it only the question as to whether the Settlement Agreement draft was a written agreement. Because Respondents never asserted an oral contract, but only that a signed written contract had been formed, the Statute of Frauds was not relevant. That is because the Statute of Frauds only prevents the enforcement of oral contracts in certain instances. The Trial Court applied its own law to conclude that an oral contract was formed, and could just as easily, and more properly on the facts before it, have ruled that the Statute of Frauds applied to prevent the enforcement of an oral contract. When the Trial Court held in its final order, on its own initiative, that an oral contract was formed, the Statute of Frauds became an issue, but the Trial Court simultaneously "closed the record" preventing the issue from being argued further. A party is entitled to objectto evidence of an oral contract and raise the Statute of Frauds after all the opposing party's evidence has been presented at trial, (see discussion in Borchardt, Id.)

The Borchardt case discussion, cited and relied on by Respondents is distinguishable in many respects. The plaintiff, asserted only an oral contract with terms putting it within the protective provisions of the Statute of Frauds, and

the defendant admitted that an oral contract for employment was formed. In Borchardt the court held that the defendant waived her defense of the Statute of Frauds because of her admission of a contract and her failure to object to assertions of an oral contract. (Borchardt, Id., p. 327.) The Borchardt case was appealed after a jury trial, (Appellant has not had a trial); the defendant accepted, without objection, jury instructions that allowed the jury to find an oral contract, (Respondents did not assert an oral contract); and, the defendant admitted that an oral contract was formed, (Appellant has consistently denied the existence of any contract).

Where the record shows there was no basis in law for the theory argued at trial, it will be disregarded in determining the appeal. (Bartholet v. Berkness, 291 Minn. 123, 189 N.W.2d 410, (1971); Borchardt, Id.) The Respondents argued only that a signed written contract was formed. There is no theory of contract law supporting that argument, based on the fact allegations made by Respondents or found by the Trial Court. In applying a theory of law, the Statute of Frauds is compelling. The court will pass on a contention not raised at trial where it will undoubtedly arise on a retrial that is rendered necessary by other errors, (Christianson, Id.).

Even ignoring all of the above points, Respondents' argument still fails because all necessary legal aspects of the Statute of Frauds were identified and raised in the Trial Court. The Trial Court simply chose to ignore the issue. Appellant argued extensively in his memorandum of August 4, 1992, that the terms of the proposed settlement offer required a writing signed by Appellant. (Apls.Memo., Aug. 4, 1992, p. 12, l. 20-23; p. 12, l. 26 to p. 13, l. 1-29; p. 14, l. 20-25; p. 15, l. 10-16, p. 16, l. 1-12; p. 16, l. 20 to p. 18, l. 3.) Appellant's, "Memorandum And Affidavit In Response To Defendants' Motion To Strike", Id., discusses the consequence of Respondents' failure to comply with the Statute of Frauds,

(A-167, prg. (e), esp. l. 20-28, Vol. II). Cases reviewed by the Trial Court discuss the relevance of the Statute of Frauds to settlement agreements and its restrictions. The Trial Court's last memorandum indicated that the Bergstrom case was carefully reviewed in formulating an opinion. That case distinguishes situations covered by the Statute of Frauds, (see Bergstrom, Id., p. 932 and Ftnt. 7). The Statute of Frauds argument is properly before this Court.

2. Whether The Statute Of Frauds Applies To This Case.

Respondents assert that the Statute of Frauds does not apply to this case arguing that it does not exist to prevent a contract by fraudulent means. The Respondents have never alleged any facts to support such contention of fraud by Appellant. At all times prior to the Trial Court's final ruling the Appellant denied the existence of any contract, oral or written, meaning that Respondents could have put their Settlement Agreement claim aside and reactivated their counterclaims, sanctions and defenses. Cases showing evasion deal with situations where a party has deliberately sought to be misleading, and then disclaim his obligations by asserting the Statute of Frauds. The courts uniformly recognize that, where a party denies both an oral and written contract, as Appellant did here, application of the Statute of Frauds may have harsh consequences as to the party seeking to enforce the contract. Appellant explained those consequences to Respondents and the Trial Court by way of Plaintiff's Response To Defendants' Motion To Strike, (see A-167, prg. (e), and above footnote 6), even though the Statute of Frauds was not in issue at that time. Appellant promptly instructed his attorney, the very next available day after negotiations had been initiated, to terminate those negotiations, (Apls.Ltr., Oct. 14, 1991, RA 160-162). Asserting the legal right to the protective provisions of the Statute of Frauds certainly does not make that party a "fraud", as Respondents argue.

Next Respondents claim there is a general consensus that a Settlement Agreement will not be impaired by the Statute of Frauds. None of Respondents' cited cases support that assumption. The leading case cited by Respondents is Bergstrom, Id. That case specifically recognizes that the Statute of Frauds applies to settlement agreements, (see Bergstrom, Id., discussion at p. 932, and Ftnt. 7). The same rationale applies in cases decided by Minnesota courts, Ghostley, Id., Theis, Id., Jallen, Id.

The Statute of Frauds is a principle of contract law, and the Trial court in this case held that principles of contract law apply to settlement agreements in Minnesota. That is the law of this case. (See Trl.Crt.Memo., A-422, l. 4-9; also Beach, Id.; Hillmeyer, Id.; and Fulgence v. J. Ray McDermott & Co., 662 F2d at p. 1209 discussed in Bergstrom, Id., p. 932.)

The decision in Owens, a New York case cited by Respondents, has to do with general obligations law. In that case Owen's husband, an attorney, negotiated a settlement agreement which he accepted and Owens agreed to and ratified. It was her attorney who later objected to the agreement. The facts show that Owens personally agreed to the contract. The other cases cited by Respondents deal with the issues of "authority" and whether a settlement agreement can be oral or written, not whether a settlement agreement withinthe Statute of Frauds may be oral or written. None of Respondents' cited cases discuss the Statute of Frauds, and they do not support Respondents' argument. In Austin, the Statute of Frauds was not in issue. The undisputed evidence in the case showed that the agreement was reached. No evidence was submitted to refute that an agreement was made. No evidence was submitted on the record pertaining to a Statute of Frauds argument, nor was the doctrine raised by action or defense at trial or on appeal. In Johnson the

parties personally admitted their assent to an oral agreement, that fact was undisputed and the Statute of Frauds was not raised as an issue. In Skalbeck the settlement was consented to on the record, and no Statute of Frauds issue was raised in the trial court or on appeal. Similarly, the Rosenberg case has nothing to do with the Statute of Frauds. The Statute of Frauds was not raised as an issue at trial or on appeal.

Next, Respondents argue that the provisions of the settlement form do not come within the Statute of Frauds. The Statute of Frauds requirement in question applies to contracts that cannot be performed within one year according to their own specified terms, such as the Settlement Agreement form provisions in this case. The restriction does not apply to contracts that by their own terms can possibly be performed within one year, even though the parties have not contemplated such performance. (Dunnell's Minn. Dig., 2d Series, Vol. 17B, p. 264.) Dunnell's discussion and the discussion of the cases make the application clear. For example, where a contract for employment specifies a term of "life time employment", the agreement term can be performed within one year, (ie: by the death of the employee), and the agreement is not within the protective provisions of the Statute of Frauds. But, where a contract for employment specifies a term of one year beginning the day after it is made, the contract cannot possibly be performed within one year by the contract's own terms, and the agreement falls within the protective provisions of the Statute of Frauds. (See the discussion in Borchardt, Id.; Lally v. Crookston Lumber Co., 85 Minn. 257, 88 N.W. 846; Roaderick v. Lull Engr'g. Co., 296 Minn. 385, 208 N.W.2d 761.)

In this case the provisions of the Settlement Agreement provide specific terms of more than five years, and it is squarely within the Statute of Frauds. Respondents argument is misleading as to the provisions of the draft Settlement

Agreement that put it within the Statute of Frauds, and those that specifically require Appellant's personal execution of the form.

Paragraph 6 states:

"...neither he [Appellant] nor anyone acting on his behalf will acquire any ownership interest in Lee Data Corporation for the period commencing September 27, 1991, and continuing through December 31, 1996."

The Respondents misrepresented the clause at A-032, line 8, as being limited to Appellant only. The true provision is much broader and can not be extinguished by Appellant's death. The provision prevents Appellant from establishing a trust, will or other legal vehicle to purchase Lee Data stock on his behalf within the firm specified five year term.

Paragraph 5 states:

"Mr. Bergmann understands and agrees that by executing this Settlement Agreement and General Release, he waives any future claim to employment with Lee Data...at no time after execution of this ...Agreement...will he ever seek employment with Lee Data...". The emphasized language, deleted by Respondents, highlights the required personal nature of the execution and is significant in combination with the fact that Respondents drafted the agreement form to included this requirement.

The time period is specified by paragraph 5 as, "at no time after execution.". That time period gives perpetual duration to the settlement document leaving it unenforceable as a contract with a mandated perpetual term, not an indefinite term.

All cases cited by the Respondents support the above analysis. In Ecklund, an agreement with a term designated as the lifetime of an employee was not within the Statute of Frauds. In Tomson, (Rsp.Brf., p. 30), the question was whether a contract provision requiring "confidentiality for the rest of the parties lives" put the agreement within the Statute of Frauds. The court's decision was consistent with the above case law and Appellant's argument. The agreement was not within the Statute of Frauds because it was capable of performance within one year under its own terms. Kuykendall, (Rsp.Brf., p. 30), is based on similar facts and the court properly made the same decision.

Respondents go on to argue that Worwa, (Rsp.Brf., p. 31), a case cited by Appellant, has no application to restrictive covenants. In Worwa, the plaintiff filed a motion to amend his complaint to allege the existence of an oral covenant not-to-compete with the defendants for a term of 5 years, within a 2 mile radius, for a price of $30,000. (Worwa v. Solz Enterprises, Inc., 238 N.W.2d 628, (1976), p. 630, prg. 2.) The court held that, by its own terms the alleged oral contract could not be performed within one year and that it was unenforceable under the Statute of Frauds. (Worwa, Id., p. 631, 3rd prg.)

Clearly the provisions of the Settlement Agreement draft designating a definite term beyond one-year put it decisively within the Statute of Frauds as a matter of law.

Last on this point, Respondents argue that the settlement document does not come within, Minn.Stat., Sec. 336.8-319, which deals with the sale of securities. Respondents allege that the document's prg. 2, which would require the transfer of Appellant's Lee Data stock for consideration, is not a "sale" under 336.8-319. Minn.Stat., Sec. 336.1-201(32), included as part of Article 8 pursuant to Minn.Stat., Sec. 336.8-102(6), defines a securities sale purchase as any "transaction

creating an interest" in such property. The settlement draft purports to transfer an interest in Appellant's stock, which would clearly be a "sale" of securities within Minn.Stat., Sec. 336.8-319. An application of this is shown in Ryan v. Ryan, 193 N.W.2d 295, cited in Rsp.MacRae'sBrf., pg. 9. The parties recognized the settlement agreement transfer of stock as a "private placement" sale.

The settlement draft is not enforceable against Appellant because, even if a signed agreement had been made, the form does not specify the quantity of stock to be sold. Minn.Stat., Sec. 336.8-319(a), requires a signed writing "sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price". It is essential that the quantitiy be stated. Clearly the quantity is not stated, and the statute requirements are not met.

3. Whether The Settlement Agreement Form Meets The Requirements Of The Statute Of Frauds.

The Respondents argue that Appellant's attorney gave his "approval" to the Settlement Agreement form, (see Rsp.Brf., p. 32, Ftnt. 15, alleging that

"Mr. Bergmann's agent gave his approval to the settlement, both orally and in writing"). Respondents then argue that Mr. Greenberg's notation of "approval" operated as a memorialization of "acceptance" of the document. Mr. Greenberg's notation, as he confirmed in his affidavit nearly one year later, (AGG.Aff., Id., pg. 2, prg. 8), was his manifestation of "review", but not an "approval" and certainly not an "acceptance". An "approval" is merely the act of confirming some act done by another, it is not an acceptance, (Black's Law Dictionary, Rooney v. South Sioux City, 111 Neb. 1, 195 N.W. 474, 475).

In this case, Mr. Ginsburg drafted the Settlement Agreement document as Respondents' counteroffer, (Gins.Aff., Id.), to Appellant. He then gave the document to Mr. Greenberg who, seeing it for the first time, reviewed it for Appellant's acceptance, which he said he could not obtain until October 18, 1991. On October 14, 1991, Appellant revoked any authority that Mr. Greenberg may have had to negotiate a settlement agreement, by meeting with him personally to limit his authority, and by delivering Appellant's letter of the same date to document that instruction, (see RA-160).

"Signing", or "subscribing" to an acceptance, as the Statute of Frauds requires, may be indicated in different ways, as long as there is a clear manifestation of acceptance. Here, the document in question required a carefully defined method for "subscribing" to an acceptance. Paragraphs 5, 7, and 10 express the requirement that Appellant personally sign the document to execute it. The signature lines confirm the express terms. Respondents drafted the document and any inconsistency or ambiguity must be construed against them, but it is clear that Appellant's personal signature was required by the documents express terms. The notation of Mr. Greenberg cannot operate as a memorial of acceptance as a matter of law. The cases cited by Respondents do not change this. In Beach there was a clear and undisputed "acceptance" on the record. There is no indication that Beach or BA Leasing involve a Statute of Frauds issue. (Rspdts.Brf., p. 33.)

The Respondents argue that parol evidence is admissible to "explain the circumstances surrounding and leading up to the agreement". Parol evidence is admissible to explain a particular term or condition, not to prove the existence of an agreement, not to change a term, not to add a term, and not to delete a term. None of the cases cited by Respondents change the rule. MacDonald and Greer, (Rsp.Brf., p. 34),

confirm Apl's. position. In Clark, (Rsp.Brf., p. 34), the court considered the rule that proceedings of a public body may not be impeached or contradicted by parol evidence because the dependability of the substance of the records must be insured, (Clark, p. 562-563). Clark has absolutely nothing to do with the applicability of parol evidence to a contract.

Respondents quote the Trial Court in arguing that, if Mr. Greenberg had authority to enter into an oral agreement, a settlement was "perfected...before anything had been reduced to writing", and lack of assent to the written document by Appellant was therefore "immaterial". (A-419, Rsp.Brf., p. 35.) That is illogical in view of the terms of the alleged oral agreement, and in light of the Statute of Frauds. According to Respondents and the Trial Court, the alleged oral terms were identical to the document terms. (That has to be so as a matter of law.) Since the alleged oral contract put it within the Statute of Frauds, an oral agreement could not "perfect" a settlement agreement. Similarly, since the alleged oral terms required Appellant's personal assent, an oral agreement could not have been "perfected" without it. Nor does it make any difference whether Mr. Greenberg had express, implied, apparent or no authority, since he chose not to exercise any authority he may have had.

Respondents argue that in Upton Mill & Elevator Co., "there was no writing, notation or signature of any kind...". In that case the court recognized the typed company name as a signature, the form was completed by its employee, but final acceptance by an officer was required by the order form terms. The Upton case is on point.

Dataserve Equip., Rural American Bk., and the other contract cases cited by Appellant are all relevant for the purpose of explaining the meaning of a "signature" and "acceptance within the terms of a document". Dataserve is squarely on point. Respondents argue that Rural American

Bk. is not relevant because it deals with credit agreements. Austin Farm Equip., relied on heavily by Respondents, also deals with credit agreements.

Last on this question, the Respondents have chosen not to recognize the meaning of the document's paragraph 7, regarding modifications, (Rsp.Brf., p. 36). Respondents drafted the clause. The paragraph precisely provides the requirements for executing the related "Stipulation For Dismissal", which was not prepared in the manner prescribed, and is also controlling as to how the document's signature and acceptance provisions must be modified. The document's terms did not allow an acceptance by Mr. Greenberg. To allow his acceptance required a modification in accordance with paragraph 7. Respondents admit that the document terms were not modified, (Rsp.Brf., p. 36, l. 7-9), therefore, the "Stipulation For Dismissal" is ineffective, and the notation by Mr. Greenberg cannot operate as an acceptance under paragraph 7.

[PAGES 24 TO 25]

E. Whether The Trial Court Properly Dismissed The Case Based On Three Independent Reasons.

Since a contract enforceable against the Appellant was not formed, the dismissal is invalid. The dismissal is also invalid under paragraph 7 of the written document which the Trial Court specifically enforced because it required the individual parties to personally sign that undertaking.

The Trial Court's finding that the case could have been dismissed for noncompliance with its ordered sanctions is inconsistent with the Statute of Frauds and the courts findings that an oral agreement was formed releasing sanctions, the parties prior understanding that sanctions were not required to be paid until after Appellant's completion of the deposition of Ms. MacRae, (which to this date has not been completed), and Appellant's right to a hearing as to attorney misconduct.

F. Whether Appellant Presented Evidence To Support His Claim Of Attorney Misconduct.

Appellant was denied his right to a hearing on these issues, and he did provide uncontested evidence of misconduct by Respondents' attorneys. (See Plts.Memo.Aff. in response to Defs.Mot.Strk., A-141, Vol. II, esp: pages A-190 to A-196, concerning violations of the court's Protective Order; pages A-187 to A-190, concerning the "White Notes"; pages A-149 to A-157 and A-168 to A-187, concerning misrepresentation.) Appellant was denied his right to compel Respondents' counsel's appearance at a hearing on these facts, and he was denied his right to compel their appearance on his Show Cause Order Application.

PETITIONER'S APPELLATE BRIEF
DATED AUGUST 30, 1993

[PAGES 45 TO 48]

III. Whether the October 1, 1991 dismissal of the case should be vacated and Appellant granted special relief in the interests of justice due to attorney misconduct, an abuse of discretion by the Trial Court, and the appearance of judicial misconduct?

Argument.

Attorney misconduct and judicial prejudice is apparent in this case. Appellant's documentation of Respondents attorneys' misconduct is provided by was of Appellant's, "Plaintiff's Response To Defendants' Motion To Stike", (App.Vol. II., beginning at A-141; also see Apls.Mot., Nov. 27, 1991 with Apls.Aff., Jan. 10, 1992 and Apls.Supp.Aff., Jan. 13, 1992). Appellant renewed his request for Trial Court action as to attorney misconduct for the fourth time by serving his Application For Order To Show Cause on the Trial Court November 26, 1992. (An acknowledgment of service of the Aplication was provide by the Trial Court office on that date.) The Application further supports allegations of misconduct and it is included with the Appendix beginning at page A-363, Volume III.

The Trial Court refused to review Respondents attorneys' misconduct on all four motions. Clear evidence of prejudicial misconduct is documented byAppellant's memoranda and affidavits, (Id.). At the hearing held January 14, 1992, the Trial Court cut off Appellant's offer of evidence including the introduction of the acknowledged tape recorded statement of Appellant's attorney, (Trscrpt., at A-124), which contained information in conflict with the unsworn statements that Mr. Greenberg made at the

hearing pursuant to a question raised by the Trial Court. At that hearing the Trial Court made its bias clear when Appellant was told that his allegations of bribery and misconduct were merely allegations of what good attorneys do, and that is the way the American system of justice operates, (see A-460 to A-463). Appellant is entitled to review of his motions and applications concerning prejudicial misconduct in this case: "When disobedience of an order of court is shown, [Respondents' counsel's violation of the Protective Order], a prima facie case of contempt is made, and the burden is then on the person charged with contempt to show that it was not in his power to obey." (Meisner v. Meisner, (1926), 220 Minn 559, 20 NW2d 486; U.S. v. Rylander, (1983), 460 US 752.)

If the dismissal is set aside and Appellant is allowed his discovery and a trial, the Appellant will show that Respondents attorney Mr. Ginsburg and Appellant's own attorney Mr. Greenberg colluded to impune Appellant's character and conduct by way of their misrepresentations, and material omissions), before the Trial Court, (see Apls. Motions, Responsive Papers, Application and Affidavits, Id.). The Trial Court's resulting oppressive sanctions were intended to force Appellant to quit the case, or to bring about an involuntary dismissal. Appellant will show that those attorneys colluded to achieve the same result by other means.

Appellant will show that Mr. Ginsburg, with the assistance of Mr. Greenberg, bribed two witnesses whose depositions, taken by design in the presence of Appellant, contained manufactured misrepresentations that were intended to cause Appellant to have an emotional breakdown and give up his case against his will. The witnesses who testified falsely, are Diane Hanson, against whom Appellant has obtained a District Court judgment for her part in Mr. Ginsburg's strategy, and Appellant's own psychologist, Mindy Mitnick. Appellant will show that Ms. Mitnick

knew Appellant's weaknesses and vulnerablities and that she exploited that information with the intent to cause Appellant's emotional breakdown in exchange for a bribe.

A stipulation for settlement may be set aside or avoided upon a showing that one of the parties was fraudulently induced to enter into the agreement, (Keller v. Wolf, (1953), 239 Minn. 397, 58 NW2d 891; Wilson's Inc v. Twin City Frieght Inc., (Minn.Ct.App. 1985), 378 NW2d 117). Misrepresentation as to the validity of a claim would also defeat a compromise, (Nybladh v. Peoples State Bank, (1956), 247 Minn. 88, 76 NW2d 492). Misrepresentations will defeat a compromise even though they are made in good faith and not with a design to deceive or defraud, (Becker v. Messner, (1928), 175 Minn. 471, 221 NW 724). A compromise may be attacked collaterally on the ground that it was unauthorized and fraudulently entered into by an attorney, (Albert v. Edgewater Beach Bldg. Corp., (1944), 218 Minn. 20, 15 NW2d 460. Where there is a dispute as to whether a settlement was reached, it is ordinarily for the trial court to determine what the facts are and the matter is appropriate for the jury to consider, (Jallen, Id.; Mullin v. Minkel, (1929), 177 Minn. 42, 224 NW 255). Where through fraud, mistake, undue influence, or duress, either offer or acceptance is not the genuine contractual consent of a party, the law allows him to avoid the contract, (State v. Bucholz, (1926), 169 Minn. 226, 210NW 1006).

Here, the actions by Mr. Ginsburg, and others wrongfully influenced by him, caused a "duress". (See Wise v. Midtown Motors, (1950), 231 Minn. 46, 42 NW2d 404.) Both the duress and the provoking misrepresentations and misconduct by counsel compel vacating the dismissal, allowing Appellant's discovery and a trial on the facts and issues.

PETITIONER'S MEMORANDUM AND AFFIDAVIT IN RESPONSE TO DEFENDANTS' MOTION TO STRIKE DATED NOVEMBER 19, 1992

[*PAGES 9 TO 17*]

II. MISREPRESENTATION AND PERJURY

A. Misrepresentations Contained In Dorsey & Whitney's Papers Served August 19, 1992 And Related To Unlawful Disclosure Of Plaintff's Confidential Records, And Case Records, For Purposes Of Bribery And Fabrication Of False Testimony.

Dorsey & Whitney's papers served August 19, 1992 and supplemented with Ginsburg's signed affidavit served September 4, 1992 contain material inconsistencies and misrepresentations.

Maki represents under her signature that Defendants provided my confidential records to Diane Hanson in compliance with Hanson's subpoena, on or before August 26, 1992, one month prior to Ginsburg's taking of Hanson's deposition. (See Gins.Aff., Exh 1, the "Hanson" subpoena.) Maki falsely states that Hanson's attorney did not "rescind" that subpoena, (Defs.Memo., p. 6, l. 7), and that she would have been subject to the contempt powers of the court for not complying, (Defs.Memo., p. 6, ls. 7-9). Maki falsely states that Ginsburg notified me of his intention to comply with Hanson's subpoena by letter dated August 20, 1991, (see Gins.Ltr. at Gins.Aff., Exh 2). (Generally see Maki's representations at Defs.Memo., pps. 5-7.)

Maki's recollection and contention as to the time of the disclosure of my confidential records on or before August 26, 1991 is accurate. As I have previously pointed out to the court, Hanson had knowledge of my confidential records in

order to fabricate her false testimony. By illegally providing that information to Hanson in advance of her deposition, and by other means, Maki and Ginsburg helped Hanson prepare her false testimony. They gave her sensitive information which she could not legally have obtained at that time and which she intended to use to maliciously defame and harm me. (See Bergmann v. Hanson Dist.Crt. case file number: CT-91-12540, the record of that case is incorporated herein by reference; and see resulting Order, EXH. F.) Giving sensitive, confidential medical records, to a witness who was known to Dorsey's attorneys to have a malicious retaliatory predisposition toward me, was outrageously irresponsible, but it served their purpose in skillfully creating false testimony and threatening a further criminal defamation of me.

Maki's contention that the disclosure was legally made pursuant to Hanson's subpoena is wholly false.

In connection with their disclosure of confidential medical and other case records, and to cover up their wrongful conduct, Ginsburg and Maki made further misrepresentations to the Court by way of their "Memorandum In Support Of Motion To Strike", signed by Maki, ("Defs.Memo."); a signed revised "Supplemental Affidavit Of Roy A.Ginsburg", ("Gins.Aff.") in support of that Memorandum; and a conflicting unsigned "Supplemental Affidavit Of Roy A. Ginsburg". Those misrepresentations firmly and factually establish the deceitful tactics of Ginsburg and Maki.

Ginsburg and Maki made a misrepresentation to the Court in stating that the, "Defendants and their attorneys complied with the discovery rules in producing", my confidential medical records. (Ref. at Defs.Memo., p. 5, ls. 16-20; and note that Defs. have never denied providing those records.) The subpoena fails to comply with the rules for discovery because it was not served in connection with a duly noted deposition as required by Minnesota Rules of

Civil Procedure, ("MRCP"), Rule 45.01. That rule specifically states that a violation of it, "constitutes an abuse of process and shall subject the attorney or party to appropriate sanctions or damages". Ginsburg knew of that rule, and he knew of the impropriety of the subpoena because he had reviewed my advance written notice. (See Gins.Aff., Exh. 3, prgs. 1, 3.) The subpoena also failed to provided me with adequate time to respond, (2 days), to move to quash. Ginsburg was aware of that impropriety and he was aware of my intention to file a motion to quash. (See Gins.Aff., Exh. 3, prg. 1, ls. 12-15.)

Maki and Ginsburg misrepresented to the Court that they, "notified [plaintiff] in writing that [defendants] intended to comply with the subpoena unless [plaintiff] moved to quash the subpoena before the return date". (See Defs.Memo., p. 5, ls. 20-23, and p. 6, ls. 1-3; see ref. Gins.Aff., Exh.2; see Gins.Aff. p. 2, prg. 5.) Defense counsel did not notify me. Their Exhibit 2 is addressed to Alan Greenberg, an attorney who appeared in this matter, but not my attorney in the matter pursuant to which the subpoena was issued. I was represented in the Hanson matter by Larry A. Celander, who was counsel of record in that case, and pro se in association with Celander, subsequent to his illness and my notice served on the parties and for filing of record with the Court on July 19, 1991. My letter of August 22, 1991, gave full notice to Ginsburg of my pro se representation. Further, Greenberg never notified me of Ginsburg's letter of August 20, 1991. (The fact that Greenberg did not notify me of Ginsburg's letter is indicative of collusion.)

Ginsburg and Maki lied to the Court when they represented that Mr. Theodotou did not, "voluntarily rescind the subpoena", and that "defendants were subject to the contempt powers of the court if they did not comply with the subpoena". (See Defs.Memo., p. 6, ls. 4-12; unsigned Gins.Aff., p. 3, prg. 6; and compare signed Gins.Aff., p. 3.) I

sent my letter dated August 22, 1991, (Gins.Aff., Exh. 3.), by U.S. Mail on the morning of August 22 by depositing it at the downtown post office in order to assure its delivery in advance of the production date. Theodotou received and acted on my letter by August 24, 1991, when he acknowledged to me verbally thathe would not enforce the subpoena, and that he had so advised Ginsburg. Theodotou confirmed his rescission of the subpoena in writing. (See Theo.Ltr., Aug. 26, 1991, EXH. G.) Following Theodotou's rescission of the subpoena, I was not notified of any later subpoena in connection with any case or matter, or any related notice of deposition, or other production date.

Despite Theodotou's instruction to Ginsburg and assurances to me, I did not trust Ginsburg to refrain from providing the records. I expected that Ginsburg would use the guise of the subpoena to provide Hanson with my confidential medical records for the purpose of fabricating false testimony. In an attempt to prevent such unscrupulous deceitful conduct by Ginsburg, I sent my legal counsel, Larry Celander, to appear at the place designated for the production, at the time and date appointed. Pursuant to Celander's affidavit, no one was present at the designated place and time of the production. (See Celdr.Aff., EXH. H.) The fact that Ginsburg and Theodotou were not present at the place and time designated for the production confirmed that Theodotou had effectively notified Ginsburg of the rescission of the subpoena. So, to accomplish their deceitful purposes to violate the Protective Order, bribe Hanson, and prepare her manufactured testimony, Ginsburg and Maki sent my confidential medical records and all other information related to the suit directly to Hanson, or Theodotou, or both of them, completely outside of the subpoena process and in total disregard for it.

Ginsburg's amended signed Supplemental Affidavit contains materially false and inconsistent representations concerning

the events surrounding the disclosure of my confidential records. First, Ginsburg truthfully confirmed that he received Has non's subpoena of August 8, 1991. (See Gins.Aff., p. 2, prg. 3 ref. to Exh 1; and, p. 2, prg. 4, describing the subpoenas requirements.) Next, Ginsburg confirmed that he complied with that subpoena which required that document production on August 26, 1991. Gins.Aff., p. 2, prg. 5, confirms that, and his recollection as to the time of that disclosure is consistent with M[illegible]'s and with my statement. Gins.Aff., p. 2-3, prgs. 5-6, suggensts that I could have prevented that disclosure by serving a Notice of Motion and Motion, and that Ginsburg produced the documents even though he new of the improprieties associated with the subpoena and despite the established fact that Theodotou told him not to produce the information. Ginsburg was copletely aware of my objections to the Hanson subpoena and the improprieties associated with it before providing the documents. That is apparent by his reference to my letter to Theodotou dated August 22, 1991, (Gins.Aff., p. 2, prg. 3), and by his confirmation of his knowledge that I informally contacted the attorney who served the subpoena, (Gins.Aff., p. 3, prg. 6, and ref. to Exh 3). The production was illegal and contemptuous. Even though the subpoena did not follow legal procedure and had been rescinded, Ginsburg obviously had his own purposes in mind when he provided Hanson with the information and confidential records to facilitate his fabrication of her perjured testimony.

Gins.Aff., p. 3, prg. 6 attempts to justify his illegal disclosure by stating that a later subpoena from the Department of Jobs andTraining, ("DJT"), requested the identical information. The existence of a later subpoena certainly does not justify his initial illegal acts. The crucial distinction is that the DJT subpoena was requested by Theodotou after Hanson's perjured testimony was prepared and taken by Ginsburg. (See Theo.Ltr. dated Oct. 7, 1991, EXH. I.)

Within the DJT rules and informal procedures, I moved to quash Theodotou's request for the DJT subpoena. (See Berg.Ltr., misdated Oct. 25, 1991 but noting it had been sent Oct. 9, 1991, EXH. J.) Ginsburg's statement that he confirmed with Theodotou that I had not taken action to quash the subpoena is a lie, (see Gins.Aff., p. 3, prg. 6, ls. 19-21), as the court can plainly see from my letter, EXH. J.

Ginsburg's representation that he would be in violation of the DJT subpoena and a court order if he did not produce the documents to Theodotou, (ie: The same documents he previously and illegally disclosed to Hanson), is another lie. Ginsburg stated that he was compelled to obey the subpoena, but the true facts show that he willfully disregarded its requirements when it wasreissued on November 14, 1991. (See the affidavit of Samuel B. Fried, Director of the Appellate Office, Minnesota Department of Jobs and Training, Frd.Aff., EXH. K.) Ginsburg did not produce the documents and appear at the noticed hearing as it specifically required, (see Gins.Aff., Exh 4, pg. 2, ls. 1, 5-9). Since the DJT does not have a requirement to notice the deposition of a custodian of records, as required by MRCP, Rule 45.01, their rules require the custodian to appear at a hearing so that a questionable production can be challenged at that time. Ginsburg claims he was not required to go to the hearing because he thought Hanson's company went bankrupt in between the time he received the subpoena by mail, (sometime after October 8, 1991), and the hearing date scheduled a few days later and stated on the subpoena, (October 16, 1991). (See Gins.Aff., p. 4, prg. 6, ls. 2-7; and Exh 4, p. 2.) That representation is an absolute lie. Neither Hanson's companies nor Hanson filed bankruptcy, there is no record of such a claim in connection with the DJT proceedings, and the issue of a bankruptcy is wholly irrelevant in connection with such proceedings anyway. (See Frd.Aff., EXH. K.) Ginsburg willfully and wrongfully produced the documents to

Theodotou, and he was ordered to appear at the hearing. The hearing did go forward, Hanson did appear by representation, and Ginsburg did not appear, all of which is documented by the DJT Determination and Findings. (See the Department Of Jobs And Training, "Notice Of Findings Of Fact And Decision", dated December 2, 1991, EXH. L; also see the Frd.Aff., EXH. K.) If Ginsburg truly felt he would have been in violation of a court order had he not complied with the DJT subpoena, then he would have appeared at the hearing just as the subpoena and the DJT rules clearly require. Again, it is obvious that Ginsburg had only his own unlawful purposes in mind when producing documents to Hanson and he did so in total disregard of proper subpoena procedure.

Even if the DJT subpoena had been appropriate, it did not cover up Ginsburg's prior unlawful disclosure to Hanson.

Further, even if Ginsburg had been required to comply with both subpoena productions, the disclosure of my confidential medical records was unauthorized and unlawful in violation of a Protective Order, Confidentiality Agreement, and release authorization forms. Those confidential records were privileged and were not requested, but were specifically excluded by both subpoena documents. (See Gins.Aff., p. 3, ls. 18-19; Gins.Aff., Exhs. 1,4; and, discussion at Part III., "Violation Of Protective Order".)

The remainder of the Gins.Aff. is redundant misrepresentation.

[PAGES 47 TO 63]

D. White Notes.

In response to discovery requests, the Defendants and their counsel identified and produced copies of certain handwritten Investigation Notes that were taken contemporaneously during the so-called investigation of he MacRae charge. At the deposition of Gary White taken by my legal counsel on December 12, 1990, Mr. White inadvertently identified certain other notes he had made several weeks after his interviews and which summarized his alleged investigation of charges against me and supposedly supporting such charge. (See White Depo., EXH. B, p. 13, ls. 7-10.) Those notes, referred to herein as the Summary Notes, were prepared and typed after the investigation and purported to be a summary of it. The Summary Notes were not identified or produced by Defendants or their counsel, even though they were aware of them at the time of their response to my discovery requests. (ie: See Defs.Rsps., EXH. M, p. 14, ls. 1-4, showing their response to Plt.Intrg., EXH. M, p. 8, prg. 22.) When White identified the Summary Notes he was sternly reprimanded by his counsel, Maki. Maki said White had been specifically instructed not to mention or discuss those documents. (See White Depo., EXH. B, p. 13, ls. 16-20, and 11-12; p. 14, ls. 11-13; p. 15, ls. 13-16.)

The significance of the Summary Notes and a complete unedited set of the Investigation Notes is that by examining them together, Defendants' fraud in accusing me of sexual harassment and in terminating me will be apparent. That is because White included false and exaggerated allegations against me in the Summary Notes that are not supported by the handwritten Investigation Notes, and which can be proven false. White created the falsified Summary Notes weeks

after the investigation for the purpose of fraudulently documenting his opinion of sexual harassment.

The Plaintiff's Interrogatories To Defendant Lee Data Corporation, attached with EXH. M, specifically required a disclosure of the identity of both the Investigation Notes and the Summary Notes. When responding to the discovery requests in this case and in the initial case, Maki failed to identify the White Summary Notes as required by definitional instruction number 7, and interrogatory number 22, and failed to produce them as required by statement and document production requests.

It is clear from Defendants' and Maki's deliberate concealment in response to the discovery requests, and Maki's reprimand of White during his deposition, that Defendants and Maki were aware of the existence, identity and content of the Summary Notes prior to White's inadvertent disclosure at his deposition. Maki was therefore required to disclose the identity of those notes and produce them in response to my interrogatories and request for statements and documents. Defendants' and Maki's failure to identify the existence of the documents in accordance with discovery requests was a willful concealment of material information; a MRCP, Rule 11 violation by Maki; as well as misrepresentation and perjury. Since the documents would reveal my innocents, the initial criminal fraud perpetrated by the Defendants against me, and now on the Court, Maki and Ginsburg have a professional obligation to produce the documents. (See MRPC, Rules 1.2(c), 3.3, 3.4, 1.13(a), etc.)

The Summary Notes, and an unedited set of the Investigation Notes, are material to the litigation and are my only means of gaining that discovery information because of the unusual and significant lapse of memory of the Defendants. None of the Defendants or any of the witnesses seem to remember any details of the alleged charges against

me or any reason why the allegations were presumed to be a sexual harassment.

The Summary Notes are also material because White was the only person to conducted the investigation of the charges against me, and he did it pursuant to Dorsey & Whitney's instructions. (See Defs.Memo., dated Oct. 10, 1989, p. 5, prg. 2.) Those Notes will show that White documented his own false statements, pursuant to Dorsey's instructions, to substantiate his allegation of sexual harassment and used those Notes to document managementsact in terminating me. The fact that the Summary Notes contain false statements can be conclusively shown by comparing them with the Investigation Notes made contemporaneously during interviews with MacRae, and with MacRae's deposition. The Investigation Notes documenting statements made by MacRae, do not substantiate the false statements documented by White and Dorsey in the Summary Notes.

Maki's misrepresentation and perjury in connection with the Summary Notes was willfully and maliciously intended to conceal material information that would prove my innocents of the allegations of sexual harassment that were made against me. Attorneys have a legal and moral obligation to come forward with such information. Dorsey's attorneys concealed the Summary Notes and blocked my discovery of the Investigation Notes which were wrongfully excluded by Judge Sommerville who did not compare them to the Summary Notes. (The Defendants' probably did not produce the Summary Notes to Judge Sommerville for the in camera review that he ordered.) Such a comparison would prove the fraud and pattern of criminal conduct by the Defendants and their attorneys.

III. VIOLATIONS OF PROTECTIVE ORDER.

During the pendency of my Initial Action against Lee Data Corporation, served December 19, 1988, court file number CT-89-663, the Defendants proposed and drafted a Protective Order. (See Protective Order, EXH. V.) I agreed to the draft order and its submission to the Court for signing. The Honorable Robert K. Levy signed the Order February 6, 1989, and the Order was properly served by the Defendants on all parties.

At my deposition taken by Defendants' counsel, Ginsburg, on March 22, 1990, all parties agreed to and ratified their acknowledged applicability of the Order to the present action. (See Berg.Depo., EXH. W, p. 149, ls. 4-15.) Both Ginsburg and Steinberg expressly agreed, pursuant to Greenberg's statement, that information provided to them by me would be protected by that Order. The agreement and renewed acknowledgment of the Order was prompted by Defendants' request for my "Authorization For Release Of Medical Information", including my medical records maintained by Mindy Mitnick. (See "Authorization For Release Of Medical Information", prepared by Dorsey & Whitney for Mindy Mitnick, EXH. X.)

The Authorization, Exhibit X, expressly limits the purpose of the disclosure by Mitnick, and the use of the information by Dorsey & Whitney. Use of the information was limited to the "Litigation" as of May 29, 1990, and no other later litigation or other purpose. The authorization expressly prohibits Dorsey & Whitney, or Mitnick, from disclosing those medical records, "to any other or third party". The Authorization reserves the Plaintiff's unconditional right to revoke his consent at any time. That consent is hereby revoked.

Prior to my deposition of March 22, 1990, I instructed Greenberg to obtain or renew the Protective Order, and to specifically state on the record that all of my medical information is confidential. When Greenberg failed to specifically refer to my medical records, I clearly established the absolute confidential nature of those records myself. (See Berg.Depo., EXH. W, p. 153, ls. 8-13.

Ginsburg and Maki, willfully violated the Protective Order on at least two occasions, and with malicious intent.

Ginsburg violated the Order when he provided my confidential records and medical records to his witness Hanson and her counsel, Theodotou. (See Defendants' admissions at Defs.Memo., p. 5, ls. 16-17, stating that, "Defendants and their attorneys" produced those documents, specifically referring to the Plaintiff's medical records identified at the preceding ls. 11-13 of the same page; and, the unsigned Gins.Aff., p. 2, ls. 12-28. Also, ref. Plts.Aff., Jan. 13, 1992, p. 10, prg. 6g; Plts.Ltr., Nov. 27, 1991, Secs. 3, 4; and, Plts.Memo.Aff., Aug. 4, 1992, p. 3, ls. 20-26.) That disclosure was made without notice to me, (see discussion at Part II. A. above), and before the deposition of any medical witness.

When Ginsburg violated the Order and the Authorizations by providing my confidential medical records to Hanson and Theodotou, he was on notice of Hanson's malicious intention to cause harm to me. (See Hans.Depo., EXH. Y, pps. 35-37, esp. p. 37, ls. 8-10, wherein Ginsburg specifically refers to that portion of my action against Hanson which describes her threats of violence against me and my family. My action against Hanson is incorporated by reference to Bergmann v. Hanson, et al, District Court File No: CT-91-12540.) Hanson's malicious, violent, defaming statements and threats against me are thoroughly documented by my Motion for Summary Judgment, Memorandum and

Affidavit in that case. (Ref. the Complaint, File CT-91-12540, p. 5, prg. 27; p. 9, prgs. 55, 56, and 59; Plts.Memo., p. 13, prg.D to p. 20, l. 7; and Plts.Aff. with ref. Exhs., p. 12-22.) Ginsburg also knew that Hanson intended to use my confidential medical records against me. (See Plts.Memo.Aff., August 4, 1992, p. 3, ls. 20-22; also implied by Gins. knowledge of the lawsuit and its allegations.) My confidential medical records, in Ginsburg's possession, had value to Hanson for her malicious purposes, and to use in her defense against me. The disclosure of the records to Hanson constituted a bribe for that reason.

In disclosing my confidential medical records to Hanson on August 26, 1992, as Ginsburg has admitted, (see prior refs. above), he deliberately helped Hanson manufacture the false testimony provided by her deposition which Ginsburg noticed and took on September 26, 1991. By providing Hanson with my confidential medical records, without telling Mitnick, Ginsburg was able to obtain Hanson's manufactured testimony based on Mitnick's confidential evaluation. Ginsburg was then able to provide Hanson's fabricated statement to Mitnick, probably without Mitnick's knowledge that it had been based on her confidential evaluation, with the effect of causing Mitnick to change her evaluation, making Hanson's false statements seem believable, and "dovetailing" Hanson's false testimony with Mitnick's. Such a practice is reprehensible, and is a fraud against me and on the Court.

When assisting Hanson in manufacturing her false testimony about me, Ginsburg and Maki had a knowledge and understanding of my medical records and emotional vulnerability to false accusations. They knew the manufactured testimony would cause suicidal distress, based on Mitnick's untainted evaluation and notes and their personal knowledge of other facts in the case, and that the implied threat

of bringing false accusations before the Court would intimidate and coerce me in their attempt to force a dismissal of the case.

Previously, during the pendency of the Initial Action, Defense counsel, Ginsburg and Maki, violated the Protective Order by making an unauthorized secret disclosure to the Lawyers Board of Professional Responsibility of my thirty four page "Confidential" letter dated September 2, 1988, addressed to the Defendant Robert Besinger. (See EXH. Z, Berg.Ltr. to Greenberg, copying the Lawyers Board investigator Eliz.Sipe, dated June 2, 1989; and, copy of selected pages of the Confidential Letter, EXH. Z, p. 100650, 100681.) The unauthorized disclosure of the Letter was a willful and calculated deception in disregard for my right to confidence and was designed to maliciously harm me.

The Confidential Letter is my original authorship, it was written by me and delivered by messenger to the Defendant Mr. Besinger on September 3, 1988. The Letter was marked "Confidential" at the time it was delivered to Besinger. Besinger read the Letter, telephoned me to discuss it, promised not to make copies of it, promised to maintain its contents in "Confidence", and returned the only original copy of the Letter to me in a sealed envelope.

At a hearing attended by me and held before the Honorable Judge Roberta Levy on March 22, 1989, Maki claimed that my attorney had not produced a copy of the Letter in response to her discovery request. Albright replied by stating that he had already produced a copy and simultaneously handed Maki another copy of the Letter. The Letter was not read or disclosed at the hearing in any way. The Letter was not entered into evidence or shown to Judge Levy, or anyone else in the court room. There were no spectators in the court room.The Letter was not submitted as an exhibit or as a separate paper to the Court. The Letter was not filed

with the Court. No record was taken of the hearing, and no record was made of any disclosure of the Letter to anyone else either by me or my attorney. No one was present at the hearing other than me, my attorney, Maki, and Judge Levy. Not even a court reporter was present.

After obtaining the Letter through discovery, subject to the Protective Order, Maki provided it to the Defendants Lee Data and Robert Gordon to use outside of the scope of litigation, in violation of the Order, for the purpose of further disclosing it to the Lawyers Board of Professional Responsibility, in connection with misconduct charges filed against me by Gordon. The Lawyers Board dismissed the charges against me.

At the time of its decision to dismiss Lee Data's and Gordon's retaliatory charges against me, the Board's investigating officer, Vance Opperman, advised me of the unauthorized disclosure of the Confidential Letter by Lee Data and its attorneys. Mr. Opperman advised that Dorsey & Whitney's attorneys prepared and directed the presentation of the charge to the Lawyers Board. Maki has admitted that the Letter was made available to Lee Data's in-house counsel, Warren Simpson, and that it was presented to the Lawyers Board. (See Maki Letter, Oct. 17, 1989, Plts.Aff., Exh. Z, p. 1, prg. 3.) Acknowledging those facts, Maki argues that the Letter was produced in open court and was not entitled to protection. (See Prot.Ord., prg. 6, ls. 16-22, regarding an identical situation and requiring the confidence to be preserved.) I complied with the requirements of the Protective Order when the Letter was produced. The Letter was plainly marked "Confidential" at the time it was given to Maki, and that is all that was required to bring it within the Order. (See Prot.Ord, prg. 4, ls. 13-14; and prg. 2.) The circumstances in the court room were as described above. The Protective Order was in force at the time of the production. The disclosure of the Letter by Maki and

Ginsburg to Lee Data was made without notice to me. I noted the confidentiality of my records at my deposition, pursuant to Prot.Ord., prg. 6. (See Berg.Depo., EXH. W, p. 153.) The disclosure by Lee Data to the Lawyers Board was made without notice to me, in breach of the Prot.Ord., prgs. 1, 8, 12, 15.

All of the above described disclosures were made in violation of the Protective Order. (See Prot.Ord., prgs. 1, 6, 7, 8, 12, and 15.)

IV. UNDUE HARASSMENT.

Reference MRPC, Rule 4.4:

"In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

The named Dorsey & Whitney attorneys incited my former employer, Diane G. Hanson, to perjure testimony against me, (as explained above), to act on her terroristic threats and to defame me. The actions of Hanson are well documented by Dist. Crt. Case Number CT-91-12540, Fourth Judicial District, State of Minnesota and the courts order against Hanson and her company's dated Nov. 4, 1992. The record and order in that case are incorporated here by reference. Maki and Ginsburg caused undue harassment of me by inciting Hanson. They incited Hanson by falsely representing to her and her attorney, Andrew Theodotou, that I flagrantly misused the legal process, that I acted deceitfully and that I engaged in "aberrant sexual conduct". All of those representations were false and maliciously made for the purpose of causing Hanson to act on her terroristic threats and to encourage her to fabricate perjured

testimony. Hanson's letter dated July 20, 1992 to the Board of Professional Responsibility shows Hanson's reliance on Dorsey & Whitney's attorneys' representations and opinion about me. (See EXH. AA, prg. 3.) All of Hanson's allegations against me are without any basis in fact, and were developed through Maki and Ginsburg's representations and transmission of confidential information to her. They incited Hanson through false representations, amounting to criminal defamation, (Minn.Stat., Sec. 609.765), just as they inflammed the Court's hostility through misrepresentation and fraud.

The October 7, 1991 letter of Theodotou to Robert Mandell, (EXH. I), reflects Dorsey's representations to him that I was involved in sexual misconduct. Ginsburg made those representations to Theodotou to encourage him to subpoena the documents so that Ginsburg could create a pretextual excuse for his wrongful disclosure of confidential and proprietary documents to Hanson. Ginsburg actually gave documents and information to Hanson to prepare her perjured testimony, prior to her deposition of September 1991, and in violation of the Protective Order, all as discussed above. Recognizing that his wrongful disclosure of the documents could later be discovered, Ginsburg needed the guise of the Department of Jobs and Training subpoena. (See discussions above.)

At the same time, or shortly after, Dorsey's attorneys made false representations to incite Hanson, Hanson actually followed up on her threats and plotted to have me murdered. (See Swanson Aff., prg. 6, Exh. M of Plts.Aff., Dist.Crt.File: CT-91-12540.) Maki and Ginsburg acted maliciously with foreknowledge of the potential consequences of their actions because they had prior notice of Hanson's terroristic threats against me and my family. Maki and Ginsburg thoroughly reviewed my Complaint against Hanson, which details some of her threatening acts and

statements, prior to and in preparation for their deposition of Hanson. (See Hans.Depo., Plts.Aff., Exh. H, Dist.Crt.File: CT-91-12540.)

V. BRIBERY.

Minn.Stat., Sec. 609.42, describes acts that constitute bribery. Specifically, Subd. 1, prgs. (3) and (4) apply to Dorsey's actions with respect to Hanson's testimony and the transmittal of my protected confidential medical records to her in violation of a Court Order. The statute refers to any benefit or reward or consideration to a person who is about to become a witness. It does not require the payment of money.

Due to my pending action against Hanson, she wanted confidential and other discovery information from Dorsey & Whitney to assist her in a defense against me, to use for purposes of malicious defamation, and to blame me for her corrupt conduct which was being investigated by the attorney generals offices of North Dakota, Minnesota, Oregon and Illinois.

Dorsey & Whitney provided my confidential medical records to Hanson in violation of the Protective Order, as a bribe for the purpose of encouraging her false testimony against me. Hanson did not have a legal right to that information, and she needed it to develop her false testimony against me.

VI. ABUSE OF PROCESS

The Defendants' and their counsels' actions in this case constitute an abuse of process because the Defendants used the Courts Protective Order to obtain my confidential records, information and documents and then used that information to influence the Lawyers Board, Hanson, Mitnick, and others. The Defendants therefore used the Courts' Order and the

discovery process in the litigation to fulfill their ulterior motives of coercion, obstruction of justice, and fraud.

Abuse of process of the Court is the malicious perversion of a regularly issued process whereby a result not lawfully or properly attainable under it s secured. Wodd v. Bary, 1937, 179 Minn. 208, 271 N.W. 447. Proof of an abuse of process requires a showing of two elements:

1. The existence of an ulterior purpose; and
2. The act of using the process to accomplish a result not within the scope of the proceeding in which it was issued, whether such result might otherwise be lawfully obtained or not.

Pow-Bel Construction Corp. v. Gondels, 1972, 291 Minn. 386, 192 N.W.2d 812.

An abuse of process also arises upon the misuse or misapplication of process, after it has been issued, Kittler & Hedelson v. Sheehan Properties, Inc., 1973, 295 Minn. 232, 203 N.W.2d 825.

The Defendants' and their counsel used the subpoena process in disregard for MRCP, Rule 45, which is an abuse of process in itself, for their ulterior purposes as explained above.

VII. CONCLUSION

The Defendants Lee Data and Gordon, and Defendants' counsel, Ginsburg and Maki violated the Court's Protective Order for wrongful purposes, abused the process of the Court for unlawful purposes, concealed material evidence and have made a multitude of material misrepresentations. Defendants' counsel Ginsburg and Maki wrongfully bribed a witness and created false testimony for purposes of coercion, fraud and other improper purposes. I am asking the Court

to hold Ginsburg and Maki in contempt, and to award me all of my attorney fees and costs on separate affidavit and application to the Court, and for reimbursement for sanctions previously paid, without prejudice to my right to seek recovery of further damages for all claims I may have.

The failure to obey an order in favor of an opposing party in a civil proceeding constitutes a constructive or direct contempt. Johnson v. Froelich, 1935, 196 Minn. 81, 264 N.W. 232; True Share Systems v. Schmidt, (Minn.Ct.Appls. 1986), 397 N.W.2d 483. The purpose of such a contempt sanction is to "coerce the future compliance by imposition of a sanction of indefinite duration terminable on compliance or inability to comply .In re AW's Welfare, (Minn.Ct.Appls. 1987), 399 N.W.2d 223; Swift and Co. v. United Packing House Workers, 1949, 228 Minn. 571, 37 N.W.2d 831; Cohen v. Mirviss Mfg. Co., 1927, 173 Minn. 100, 216 N.W. 606. Where there is a failure to obey a court order in favor of an opposing party in a civilproceeding the sanction is an inducement for future compliance with the Order and to vindicate the opposing parties rights. Minnesota State Bar Association v. Divorce Assistance Association, 1976, 248 N.W.2d 733.

The contempt power exists independently of the statutes, In re R.L.W., 1976, 309 Minn. 489, 245 N.W. 232, and the power to determine what shall constitute contempt and to punish therefore is inherent in the Court. Johnson v. Froelich, (Id.) It is essential to the effetiveness of all other court powers. In re R.L.W., (Id.)

In this matter, Minn.Stats., Sec. 588, et.seq., applicable to Contempts, also provides for the protection of my rights in this case. In connection with the violations of the Protective Order, the court's insight in the case of Martindell v. International Telephone and Telegraph Corp., C.A.N.Y., 1979, 594 F2d 291,

is directly applicable to the conduct of the Defendants' counsel in this case. That court observed:

"Unless a protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the ears for the disposition of civil differences; in short, witnesses might be expected frequently to refuse to testify pursuant to protetive orders "

Defendants' own memoranda in this case, and throughout the record, provides ample legal basis for imposing the obligation on Defendants to pay attorney fees as a sanction for their actions here, and for granting me whatever remedial orders may be necessary.